IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974 5015

NO. 75-[redacted]

RICHARD WOOD

Petitioner

vs.

STATE OF OHIO

Respondent

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SUPREME COURT, U.S.

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FIFTH JUDICIAL DISTRICT OF OHIO

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Richard Wood, prays that a writ of certiorari issue to review the judgment of the Ohio Court of Appeals, which judgment became final on April 11, 1975, when the Supreme Court of Ohio denied further appellate review.

OPINIONS OF THE COURTS BELOW

The judgment entires by the Supreme Court of Ohio, denying further review are attached hereto as Appendices "A" and "B", infra, at pages 34 and 35. The entry filed by the Ohio Court of Appeals, the judgment to which this petition

is directed, is attached hereto as Appendix "C", infra, at page 36. The entry of the Court of Common Pleas is Appendix "D", at page 50.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court of Ohio was entered on April 11, 1975. The jurisdiction of this Court is invoked under Title 28, U.S.C., §1257(3), on the basis that rights, privileges, and immunities under the United States Constitution are contended to have been violated.

STATEMENT OF QUESTIONS INVOLVED

1) Whether an accused who asserts his right of silence and his right to counsel following his arrest properly subjects himself:

   a) to questions as to why he did not protest his innocence at the point of arrest, at the Preliminary Hearing, or at some time earlier than at the trial;

   b) to the prosecutor's argument to the jury that an unfavorable inference could be drawn against the accused as a consequence of his having exercised these constitutional rights;

   c) to questions as to why he did not consent to the search of the car (thus necessitating obtaining a search warrant) and to an argument on this point.

2) Whether a defense witness who was arrested and charged along with the defendant on trial can be properly asked why he did not protest his innocence earlier than at the trial, and can the prosecutor argue this point to the jury?

3) Where a formal request is made, under a State's Rules of Criminal Procedure, for any inculpatory statements of the accused and his co-defendant, and the State replies in writing that no such statements were made by either

of them, can the State (given the continuing duty to disclose) conceal the existence of a statement which tends not only to incriminate the witness but the defendant as well until after the defense has rested its case.

4) When the prosecution's case rests almost exclusively on the testimony of a paid informant, who was in quest of some leniency insofar as a sentence then pending against him was concerned, can the Court properly refuse to give the jury special cautionary instructions on the unreliability of witnesses of this ilk?

CONSTITUTIONAL AND STATUTORY PROVISIONS WHICH THE CASE INVOLVES

Constitution of the United States, Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

Amendment V:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

Amendment XIV:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Ohio Revised Code, Section 3719.44(D):

"No person shall sell, barter, exchange, or give away, or make offer therefor, any hallucinogen except in accordance with sections 3719.40 to 3719.49, inclusive, of the Revised Code."

STATEMENT OF THE CASE

Richard Wood stands convicted for an alleged violation of the State's Narcotics Drug Law. More specifically, the charge stated that on or about April 29, 1973, petitioner sold marijuana to another in violation of R.C. of Ohio, §3719.44(D). Following his conviction on this single count, he was sentenced to the Ohio Penitentiary. This judgment was appealed on questions of law to the Court of Appeals for the Fifth District of Ohio, where it was affirmed. The Supreme Court of Ohio denied leave to appeal. This action is a result of the judgment of the Ohio Court of Appeals.

The appeal in this cause (--that is, Court of Appeals Case No. 1109) and that of Jefferson Doyle (Court of Appeals Case No. 1108) were heard and determined simultaneously by the Fifth District Court of Appeals. The entries made in both of the appeals thus are relevant for a correct assessment of the relevant finding made. For this reason both entries are attached to this Petition as appendices. (State v. Doyle is Appendix "E" at page 53.)

STATEMENT OF FACTS[1/]

I

Bill Bonnell, a convicted felon, with a record consisting of convictions for first degree rioting (R 27); grand larceny (R 28); five or six assault and battery cases (R 56); and too numerous convictions for disorderly conduct for him to remember (R 56), testified that he bought a quantity of marijuana from Jefferson Doyle.

The veracity of Bonnell's testimony, which will be discussed more fully herein, must be measured against facts showing he was a paid informer and frequent felon. In addition, there is no question that he was motivated by his desire to have certain officers testify in his behalf at his then pending shock probation hearing (R 31,32,65,66), which they did (R 32).

In a nutshell, Bonnell testified that he was contacted by Jefferson Doyle and they agreed to meet in Dover where a transaction involving marijuana was to be consummated. In anticipation of Doyle's arrival, Bonnell contacted the multi-county Narcotics Bureau. They, in turn, contacted the local police and various surveillance teams were set up. When Doyle came to Dover, Richard Wood (the petitioner) was with him (R 41). Even Bonnell conceded he did not know Wood would be with Doyle (R 41).

Bonnell testified that after his conversations in Dover, Wood rode with him in his truck. They ended up in the area behind the 224 Club, in New Philadelphia, where the transfer supposedly took place. Doyle, he testified, in the meantime went for the drugs (R 42).

1/ In this Petition, (R --) refers to pages from the transcript of proceedings at the trial; (M --) refers to pages from the transcript of the proceedings at the pretrial motions hearing.

On cross examination Bonnell admitted he did not want to go back to the penitentiary (R 60-61), where he obviously belonged, and that he believed these officers could prevent him from going back (R 72). He denied that he had staged this entire episode. In this regard, Bonnell denied that he had tried to sell Doyle the marijuana he later turned in to the police (R 79), and he denied having thrown the money in the car then being driven by Doyle (R 80).

The overall importance of Bonnell's testimony centers upon the fact that he was the only person other than Jefferson Doyle and Richard Wood who was present during the alleged transaction. None of the officers who testified, save Captain Griffin, even asserted that they had seen any transfer take place. Specifically, Kenneth Beamer--the agent in charge of the surveillance--testified that he did not see the actual transfer or even the bag (allegedly containing the marijuana) under Bonnell's arm until after the alleged transaction had taken place (R 155). He further testified that Detective White and Captain Griffin told him that they had observed the transfer (M 20). Detective White, however, testified he did not see any transfer (R 210, M 80-83). All he could really see was that something was already under Bonnell's arm when they arrived (R 241, M 61). Further, he never told Beamer that he had seen the alleged transaction. Rather, he told him that to which he testified in court--that is, that when they arrived Bonnell was already standing beside Doyle's vehicle with a package under his arm (M 67,83).

As to Captain Griffin, although he could not see the alleged transfer when he first testified at the Preliminary

Hearing (R 289, 290), at trial he indicated that he had seen the transaction (R 266). This he maintained despite being 200 feet away in the middle of the night, in a deserted parking lot surrounded by foliage. Consequently, the credibility given Captain Griffin must be viewed in light of the glaring inconsistencies in the versions he proffered while under oath at different stages of the trial.

In this regard, Captain Griffin's direct testimony at the preliminary hearing was that:

> A ... We pulled into that parking lot and we could still see the two vehicles from that point and just at that time Boonnell [sic] was on the driver's side of the vehicle and he had a package under his arm, a large package and the passenger that was riding with Bonnell in the pickup had come out of the pickup and went around and got into the passenger side of the automobile and Bonnell backed around and got into his pickup and they both left the parking lot at that time.
>
> Q Now, when you finally came to a stop, you said you saw the informant standing with a package under his arm?
>
> A Yes.
>
> Q Did you see where the package came from?
>
> A He was standing on the passenger side, - driver's side of the automobile and, no, he come from the car but I couldn't see.
>
> Q Well -- We will object to that. That is an assumption on your part, that he came from the car. When you saw him, he had it in his hand, or under his arm. Was he leaning against anything?
>
> A No.

Confronted with the above recorded testimony, counsel then developed the following evidence:

> Q It is a fact, is it not, sir, that at that hearing you were under oath, given an oath similar to the one here?

A Yes, sir.

Q At that time it is also a fact, isn't it, sir, that you testified that after you left the Lubritorium that you drove up into the post office drive way and at that time you saw Bill Bonnell with a package under his arm. You said that?

A I said it on the tape.

Q That is what you said?

A Yes.

Q And when Mr. James asked you about the same situation you testified at that time that when you first saw him he had the package under his arm and Mr. James asked if you could tell where the package came from and you said you assumed it came from the car, is that the effect of your testimony?

A Yes, sir. (R 289-290).

This evidence, of course, conflicts with Captain Griffin's direct testimony, which was to the effect that he saw Bonnell "go from the front [of his truck] to the driver's side [of the Oldsmobile],... , and there was something passed through the window which was a large package at that point" (R 266).

In addition, it must be kept in mind that Bill Bonnell testified to having discussed with the officers, in detail before the trial, the specifics of what he alleged transpired (R 102,103). This obviously accounts both for the apparent failure of these officers to give consistent versions initially, and for Griffin's contradictory and unrehearsed version at the Preliminary Hearing. The simple explanation is that the officers just did not see the alleged transaction take place.

Viewed thusly, the State's case was wholly dependent upon the testimony of Bill Bonnell. As such, his veracity and the ulterior motives behind his actions were extremely

important. He had been sentenced to the Ohio Penitentiary, and was desperate to do anything to get out--even turn in his childhood friends for $10.00 (R 64) so that certain officers would come forward in his behalf at his shock probation hearing that was then pending (R 32,65,66). Bonnell also admitted that he would not testify but for the threat of prosecution, for the additional crimes he had committed, if he failed to do so (R 69-71).

II

For his defense, Richard Wood testified to facts showing his presence in both Dover and New Philadelphia was most fortuitous. He was at a bar in Akron when Vince Cercone and Jefferson Doyle came in. Upon being queried by Jeff Doyle as to his plans for the evening, Wood revealed he was going to Steubenville to see his daughter. Doyle then asked him if he could ride as far as New Philadelphia with him. Wood says he picked up a few personal items and a change of clothes, and Jeff picked up his wife. The plan was that he would drop Doyle and his wife off at Doyle's sister's in Sherrodsville and pick them up on the way back (R 439-440).

Wood next testified that Doyle, after they got to his sister's where he dropped his wife off, indicated he wanted to go into New Philadelphia to see Bonnell (R 440). This then brought them to Dover and to the two bars.

Inside these bars Wood says he was just "goofing off". He had a "couple of drinks or two" while Doyle and Bonnell talked (R 441). A point was reached where "Jeff [Doyle] said he had to go to his sister's or he had to go some place and wanted to know if he [Wood] was going along or would stay there" (R 441).

Wood testified that after he indicated he would stay, Bonnell, who said he was going to meet Doyle, told Wood to ride with him (ibid). They eventually ended up in the lot behind the 224 Club (R 442), where Doyle pulled in beside them. Bonnell got out of his pickup truck, and was out of his view for "a couple of minutes." (ibid).

When he saw Bonnell coming back, Wood says he got out of the truck and returned to his rented car. As he opened the car, the interior light showed the money on the back seat. This prompted him to ask Jeff about it. Following this, they started chasing Bonnell (R 443).

Jefferson Doyle, in testifying as a defense witness, showed that he was in the Akron Bar, when he overheard Vince Cercone mention that Bonnell was dealing in drugs (R 376). He then decided to get in touch with Bonnell, whose number was obtained through a common acquaintance (R 377-378).

He recalled telling Wood that, "if you are going down to Steubenville, how about taking me and my wife along and drop us off at my sister's house" (R 379). With this plan set, he called Bonnell, and asked could they get together and do some business. They agreed to meet in Dover (R 379-380).

Doyle testified that after the wife was dropped off, he asked Wood to run him over to Dover. It was after this that Doyle told Wood it was Bonnell he was going to see (R 381).

Doyle stated he told Bonnell that he did not want Wood to know what they were talking about, because he "knew Woody wouldn't approve" (R 383). In any event, he asked Bonnell if he [Bonnell] had any "grass for sale" (R 384). Doyle indicated to Bonnell that he wanted to buy about two

pounds of marijuana, but Bonnell wanted to sell him 10 pounds for $1,000.

Doyle testified his first inclination was that he could raise the money with what he had, what he felt he could get from his sister, and from Woody (R 384-385).

With that thought in mind, he "took off" for his sister's house (R 386). After he had gotten two or three miles out of town he changed his mind and started back to the 224 Club (R 383). Here the record shows the following crucial evidence:

A When I pulled into the Club I pulled in and flashed my lights so Bill would know it was me and pulled into the parking lot of Club 224 and Bill came over to the car with the marijuana and he asked me for the money. I said Bill I hate to tell you this but I can't do it right now - I can't get the money together. If you want to wait a couple days and give me time to think about it maybe I can. He said, dog gone it Doyle, you made a deal to come and I stuck my neck out and I'm here. I said I can't help it, I don't want to do it now. I said I'll buy a pound. I can borrow money off Woody. He said you didn't want Woody to know about it. I said I'll go to the truck and ask him for a loan. He'll give it to me. I'm sure he will. I don't want to use the word he said.

Q He used profanity?

A Yes, and he said profanity and walked away and got in his truck and Woody got out of the truck and came and got in the car.

Q Anything said when Woody got in the car?

A He said where did the money come from?

Q Where was the money?

A In the back seat of the car. I said I don't know. He said he don't know. Where did it come from.

Q Did he say anything about Bonnell throwing something into the car?

THE COURT: Let the witness testify.

THE PROSECUTOR: I am interested in hearing it.

Q Go ahead, Mr. Doyle.

A I think he said - what's that in the car in the back seat and I turned and looked in the back seat and there was money scattered all over the back seat.

Q Then what happened?

A He jumped in the car. I said I don't know. He said did Bill throw that in there? I said I don't know.

Q What did you do after having seen the money in the car?

A I said I didn't throw it in there.

Q What did you do?

A I said Bonnell must have threw it in there. Woody said that son-of----- is trying to frame us or set us up or something that is what he said and I took off to chase after Bill Bonnell.

Q Did you chase Bill Bonnell?

A Yes, sir (R 388-389).

III

During the cross examination of Doyle, he was asked with the Court's approval why didn't he tell the police Bonnell had set him up (R 425), and why didn't he "find it in his heart" to tell the officers what he had testified to (R 425-426). Also, Doyle was asked if he made a statement following his arrest (R 428), and whether he "protested... [his] innocence" (R 428).

As to these questions, objections were overruled by the Court, as were various motions for a mistrial. Wood was asked comparable questions.

Also, there is the fact that disputes the prosecutor's formal response to the effect that neither Doyle nor Wood

had made any statement (R 505-508, Exhibits E & F), the fact that these questions were even asked really exposes the vice in the mere asking of these prejudicial and impermissible questions. But that is not all. The Court even allowed the State to offer the belated testimony of Officer Beamer that Doyle had in fact made some very crucial admissions against both his personal interest and that of Wood (R 486-489).

Here reference is being made to the rebuttal testimony by Kenneth Beamer, which shows the following:

> A I stated to Mr. Doyle on the way back, I said, Jeff, what are you doing in the dope business, and he said, I don't know, Kenny, I don't know. I stated that I had heard there may be more out on Route 39 in a ditch or culvert.
>
> MR. WILLIS: Objection.
>
> . . . . . .
>
> A I said if you have more, Jeff, I want it - I want it all. He said there isn't any more. <u>That is all we had with us</u>. (R 488-489). (Emphasis added.)

ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

I

The Assertion Of A Constitutional Privilege Is Not Properly Part Of The Evidence To Be Considered By The Jury, And No Inference Can Be Legitimately Drawn By The Jury As A Consequence Of A Witness Having Exercised This Right.

In Griffin v. California, 380 U.S. 609 (1965), this Court held that "what the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another." The cogency of this principle is, of course, beyond dispute.

The factual background for our contentions, at this juncture, shows the petitioner was asked if he told the police his defense when he was arrested (R 465,466,469,470); and whether he ever revealed his version of the events prior to testifying in this trial (R 470). All this was done with the acquiescence and active approval of the trial judge.

Doyle, a defense witness, was asked whether he protested his innocence at the point of arrest (R 425,428) and whether he ever revealed his version of the events prior to testifying in this trial (R 431). In addition, the prosecutor, with the avid support and sanction of the Court, argued all of these points to the jury. (PA 88,90).[2/]

Given the aggressive tenor of the prosecutor's questions, designed to show (as they did) that Wood did not

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2/ (PA--) refers to the Prosecutor's Argument, which is separate from the transcript of proceedings. The Prosecutor's Argument is attached as Appendix "G" at page 77.

either at the point of arrest, or at any other time prior to testifying, personally reveal his defense; if it is determined these questions were improper, then there can be no valid contention that they were harmless. However, even if it were possible to view the mere asking of such questions as harmless, the fact that the trial judge aggressively sanctioned them, greatly magnified the prosecutor's final argument, and compounded these abuses.

Viewed in still another sense, if the questions asked, and the argument made, had not been developed with a full and complete awareness of our Supreme Court's decision in State v. Stephens, 24 Ohio St 2d 76 (1970), then we could at least attempt to rationalize his having committed these faux paus.

On the other hand, it would seem that the mere citation of Miranda v. Arizona, 384 U.S. 436 (1964), as authority for the proposition that Wood was under no obligation to make any statements should suffice. If then he was under no obligation to make any statement, it perforce follows he could not be penalized for having exercised this right. This being the case, the prosecutor's argument has to be regarded (and was intended as such) as an effort to create evidentiary value out of this circumstance.

At least, as to the argument aspect of our position here, our Supreme Court's decision in State v. Stephens, supra, appears to be on all fours with this case. In Stephens, the Court was dealing with a factual pattern which showed the prosecutor arguing, "Why did he not tell the police at the shopping center, 'Hey... look this prescription that you found, this is a good one... Why didn't he tell the police?" An objection made to this argument was overruled. Under these circumstances, the Ohio Supreme Court concluded that,

"Obviously such action has a prejudicial effect, and to allow such comment would completely circumvent an accused's privilege against self-incrimination."

Similarly, State v. Davis, 10 Ohio St. 2d 136; 226 N.E. 2d 736 (1967), which refers specifically to the prosecutor's comment upon the defendant's refusal to testify at a Preliminary Hearing is also relevant here. In that case, too, comment by the prosecutor concerning defendant's refusal to testify at the Preliminary Hearing, was held to be prejudicial error.

As to the propriety of the questions directed to Wood relative to his not having disclosed his defense at the Preliminary Hearing, the decision of State v. Minamyer, 12 Ohio St. 2d 67, 232 N.E. 2d 401 (1967), provides yet another appropriate analogy. In the Minamyer case, the Court specifically dealt with the question as to "whether the prosecuting attorney during the trial of an accused may... comment upon the... accused's refusal to testify before the Grand Jury." Here, the Court held that to allow a prosecutor to

> "comment upon the refusal of an accused to testify before a grand jury would have equally prejudicial effect and to allow such comment would completely circumvent an accused's constitutional privilege against self-incrimination. Therefore, in a criminal prosecution a prosecuting attorney may not testify as to or comment upon the refusal of the accused to testify before the grand jury." (Id, 232 NE 2d, at 403.)

Of significance too is that the Ohio Supreme Court, in the Minamyer case, went on to hold that the instructions given to disregard this impropriety did not cure the error. Thus, it follows that the Court, in our case, actually aggravated these wrongs by giving the fullest possible judicial sanction to them.

Then too there are the absolutely indefensible questions relative to Wood's refusal to consent to the search of the car. In our judgment, one can only ask questions of this nature if he is either totally oblivious to the concepts of due process, or he is convinced he can do no wrong.

For the reasons argued above, Assignments of Error Nos. 3, 4, 5, 6 and 8, as argued below, surely should have been regarded as valid. Yet this was not to be, for as the Court of Appeals saw it (the decisions of our Supreme Court to the contrary notwithstanding, as well as a virtual plethora of federal decisions, including those cited in this Petition), they were not bound by them. Hence, they simply ignored these rulings and concluded none of our complaints were valid. Even more surprising, the Ohio Supreme Court, despite the pendency in this Court of United States v. Hale, ___ U.S. ____, denied further appellate review.

Because our assailment of the positions taken by the Ohio Court is total, it is hoped this Court understands such to be our position.

In any event, the fact remains, that in dealing with the defense contention that it was improper for the State to interrogate the witness Doyle as to his failure to disclose the substance of his evidence, or otherwise "protest his innocence" at the time of his arrest; the cryptic conclusion drawn by the Court of Appeals (See Appendix, p. 40) is simply out of line with the law in such cases made and provided. This same consideration applies to the comparable position taken by the Court with reference to this same tactic as applied directly against our petitioner.

In the courts below, the State has contended that a defendant's silence in the face of police suspicion can be used at trial to impeach him after he has taken the stand and offered testimony contradictory to that earlier silence. In support of this proposition, two federal cases were cited (United States ex rel Burt v. New Jersey, 475 F 2d 234 [3rd Cir. 1973], and United States v. Ramirez, 441 F 2d 950 [5th Cir. 1971] cert. den. 404 U.S. 869). First, such is not binding upon this Court even if applicable. Second, those cases can be distinguished factually from the case at bar. Third, the proposition offered is a far cry even from the holding in Harris v. New York, 401 U.S. 222 (1971) which respondent relies upon.

It is inconceivable how a person's silence could be construed as contradictory to any testimony later given. An accused has the right not to say anything at any stage of the criminal process. Consequently, it is impossible for that silence to be contradictory to any subsequent testimony regardless of its substantive nature. For this reason, even if the doctrine enunciated in those two cases were applicable here, the Court would be ill-advised to follow such an approach.

Next, even a glancing reference to the cited cases reveals a glaring factual difference significant enough to demand distinguishing those cases from the present one. In the federal cases, the fact of silence was interwoven into the defense. Here no such factual pattern is found. More importantly, the conduct of the petitioner Wood was perfectly consistent with his testimony at trial. Even by the prosecutor's analysis of these facts, all the petitioner said were words to the effect, what's this all about. Surely this is not

inconsistent with any of the testimony petitioner offered. If it had been, it was incumbent upon the prosecutor to set forth the testimony that was inconsistent with those remarks. This he has failed to do. The reason is simple. There are no such contradictory statements. What respondent has done is to excerpt certain testimony which really is not to the point. Wood's testimony that he had no conversation with police certainly cannot be said to have been an effective waiver of his right against compulsory self-incrimination.

On the other hand, even if Harris were applicable and it was proper for the prosecutor to impeach Wood's testimony by prior inconsistent statements or acts, surely that purpose is not achieved by asking the petitioner if he told police his defense when arrested, why he did not testify at the Preliminary Hearing, and why he did not reveal his version before trial. None of these facts, even if true, are contradictory to the defense raised or the testimony given. The prosecutor entered into these areas solely to prejudice the jury against the petitioner knowing full well the inadmissible nature of the questions proffered.

The rationale of United States v. Russell, 332 F Supp 41 (1971), and United States v. LaVellee, 471 F 2d 123 (1972) are also offered to bolster the State's argument. Like the two earlier cases of Ramirez and Burt, these too are inappropriate for consideration here for the reasons given above.

Here, the Court of Appeals without a citation to any authority or precedent (there was only one case cited in the entire Opinion), grievously erred in concluding that in Ohio our prosecutors are privileged to cross examine a witness "in such a manner as to demonstrate he had not

told... [his] story at the first or other earlier opportunities." As to this, what the Court must be saying is that although a witness is advised in accordance with the Miranda concept, if he exercises any of the options given save and except making a statement he does so at the peril of being impeached should he ever testify.

The fact that it is a non sequitur to conclude that the exercise of the right of silence, or the right to obtain the advice of counsel is inconsistent with innocence; the blunt fact here is the thesis here expounded by the Court of Appeals is patently inconsistent with specific opinions previously rendered by our state Supreme Court. Here reference is being made to the opinions of State v. Stephens, 24 Ohio St 2d 67 (1970), State v. Minamyer, 12 Ohio St 2d 136 (1967) and State v. Davis, 10 Ohio St 2d 76 (1970).

Other allied contentions made herein are that it was improper (1) for the State to elicit responses showing Wood refused to consent to a search of his car, and (2) for the State to argue that this refusal and the fact that Wood and Doyle did not protest their innocence at the point of arrest were factors that could be considered in determining their innocence or guilt.

It may suffice here to simply say that for the reasons indicated above, there does not appear to be any way this Court can ratify the Ohio court's holding that these matters were not improperly argued to the jury (See Appendix, pp. 47 & 48).

Distilled, the stated position of our Court is that when an accused takes the stand and gives an innocent explanation of the facts, our prosecutors can not only cross examine him with reference to his prior silence during the Preliminary Hearing; they can also comment on these facts during final argument.

II

Where The Inculpatory Statements Of A Defendant Or Co-defendant, Requested Under Our Discovery Rule, Are Intentionally Concealed By The State, The Introduction Of Such Statements At The Close Of The Defense Evidence Is Highly Prejudicial.

Rule 16, Ohio Rules of Criminal Procedure, provides:

> "Upon motion of the defendant, the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph any of the following which are available to, or within the possession, custody, or control of the State, the existence of which is known or by the exercise of due diligence may become known to the prosecuting attorney:
>
> (i) Relevant written or recorded statements made by the defendant or co-defendant, or copies thereof;
>
> (ii) Written summaries of any oral statement, or copies thereof, made by the defendant or co-defendant to a prosecuting attorney or any law enforcement officer;"

Furthermore, Rule 16(D) provides that:

> "If... a party discovers additional matter which would have been subject to discovery or inspection under the original request or order, he shall promptly make such matter available for discovery or inspection..." (Emphasis added).

Doubtless the rule included the safeguards set forth above to prevent circumvention of the spirit of the rule. This language is not intended as surplusage but rather a guarantee to the defendant of disclosure of material essential to the preparation of his defense. In this sense,

the rule provides two distinctly different safeguards. The first places a duty upon the prosecutor to use due diligence to determine whether discoverable material exists. The second incorporates a continuing duty to disclose.

In the present case, both the spirit and the letter of the law were conveniently circumvented by an overly zealous prosecutor who had obviously allowed his private desire to win overcome his professional responsibility to see to it that justice was done.

On the 29th of June, 1973, a written request was tendered to the prosecutor partially for the purpose of discovering whether any statements were made, by the defendants, to the prosecutor or any law enforcement officer. The prosecutor's written reply on August 31, 1973, was, "Defendant made no statements at the time of arrest" (Emphasis added). The trial of the case commenced in October, 1973. After the petitioner, Richard Wood, and co-defendant, Doyle, testified for the defense, the prosecutor recalled Kenneth Beamer, who had headed the investigation and arrest of the defendants, and illicited from Beamer testimony which amounted to an oral confession by co-defendant Doyle at the time of his arrest.

Because of the importance of Beamer's testimony it is set forth again here:

> Q ... At any point subsequent to the time you placed Doyle or Mr. Wood under arrest, did you have an opportunity to have a conversation with Mr. Doyle?
>
> A Yes, sir.
>
> Q And when did you have such conversation?
>
> A After the search of the vehicle some time after 6:00 a.m. in the morning I took him back to the county jail. He rode in my car.

Q Jefferson Doyle?

A Yes.

Q And what was the circumstances of that conversation?

MR. WILLIS: Objection.

. . . . . .

THE COURT: You may answer.

A I stated to Mr. Doyle on the way back, I said Jeff, what are you doing in the dope business, and he said, I don't know, Kenny, I don't know. I stated that I had heard there may be more out on Route 39 in a ditch or culvert..

. . . . . .

A I said if you have more, Jeff, I want it - I want it all. He said there isn't any more. That is all we had with us.

. . . . . .

Q So it is fair to say, is it not, Mr. Beamer, that he didn't protest his innocence?

MR. WILLIS: Objection.

THE COURT: He may answer.

A That is correct, sir.

Q All right, now, referring your attention specifically to Richard Wood, to this defendant did you have any conversation with the defendant Richard Wood?

MR. WILLIS: Objection.

THE COURT: Overruled.

A Yes.

. . . . . .

Q And Kenny, did you have an opportunity to have any conversation with the defendant, Richard Wood, at that time and place?

A Yes, sir.

Q When was that?

A Just moments after we all arrived at the Tuscarawas County Jail.

Q Advise us what the nature or circumstances of that conversation was.

MR. WILLIS: Objection.

THE COURT: Overruled.

. . . . . .

THE COURT: He asked you when or if you had any further conversations.

A Yes.

Q At the same time?

A Yes.

Q What was the nature or circumstances of that conversation?

A I asked Mr. Wood if he would sign a consent to search his vehicle.

MR. WILLIS: Object and move the answer by stricken and the jury instructed to disregard it.

THE COURT: Now I think this witness has testified to that - permission was not given.

MR. WILLIS: I asked that the jury be instructed that no person is required to give consent and no inference can be drawn from that.

THE COURT: The court will instruct the jury that consent was not given nor is there any responsibility that consent should be given under the factual set up in this case.

Q At any time, Mr. Beamer, did Mr. Richard C. Wood protest his innocence to you?

MR. WILLIS: Objection.

THE COURT: Overruled. You may answer yes or no.

A No, sir.

Q Kenny, at any time did Mr. Wood indicate to you that he had or felt he was framed or set up?

MR. WILLIS: Objection.

THE COURT: Overruled.

A No, sir.

. . . . . .

Q At any time after the time he was placed under arrest thru the period of the subsequent investigation that morning did Mr. Richard C. Wood tell you that he was innocent -that he had been set up or framed, or both?

. . . . . .

THE PROSECUTOR: Not for that entire period of time.

THE COURT: You may answer yes or no.

A No, sir, he did not. (R 486-494.)

Obviously, if Beamer's evidence is correct, the prosecutor knew, or should have known of the statements attributed to co-defendant Doyle at least as early as several days before trial. He was, according to this witness, even reminded of such statements before he testified on behalf of the State, and reminded yet again after the defense had rested. If this is so, then it follows the prosecutor knew of these statements before Doyle testified, yet actively, willfully and deceptively concealed them from defense counsel in spite of his obligations to the accused and to the Court. Such a deliberate and active fraud upon the Court and counsel (if in fact that is what it was) is at least deserving of something different from the absolution to which the Court of Appeals felt he was entitled.

For, surely this Court agrees that nothing is more prejudicial to a defendant than the confession or admission of a co-defendant (except the confession of the defendant himself). For that reason, the most stringent control by the trial court was necessitated. At that stage of the trial nothing short of the exclusion of such evidence would have been sufficient. Such exclusion is in fact proscribed

by Rule 16(E)(3) of the Ohio Rules of Criminal Procedure which provides:

> "If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances."

What other circumstance more demands implementation of such remedy than that factually presented here.

As to this, it must be noted, the trial judge himself stated in his holding on the Motion for a New Trial that, "if the court had any evidence there was prior knowledge by the State of this statement then the court would have felt it was a prime issue and overruled or granted a motion for a new trial on this issue alone".

The petitioner respectfully submits that the trial court, without benefit of a transcript, failed to recall the testimony of Beamer, which quite clearly reveals that the prosecutor had actual knowledge of such statements before Doyle testified.

Also, and this too is significant, the law of this State still requires that a proper foundation be laid before a prior statement of this type could be introduced. Since Doyle was not asked, hence could not have denied making the statement, how can it even be said this was proper rebuttal evidence. See Runyan v. Price, 15 Ohio St 1 (1864).

On the other hand, in dealing with the arguments made at this point, the Court of Appeals made several absolutely astonishing findings--if that is what they are.

Here reference is being made to the statement that in testifying in Wood's trial "Doyle volunteered in cross-examination by the prosecutor, details of a conversation between... [himself] and Beamer at the time of his first confrontation with the authorities, at the time of the transaction in question, the night both Doyle and Wood were arrested." (See Appendix, p. 41.) (Emphasis added.)

First of all, it is simply not a fact that Doyle volunteered any such responses during his cross examination. The truth of the matter is, as the record will show, any responses made by Doyle concerning conversations supposedly had by him were made over the defense objections. This being so, it is simply not consistent to say Doyle volunteered the basis for the admission of this testimony. This is so if the Court of Appeals is using the word volunteered in either a connotative or denotive sense.

Surely this Court must agree that given the trial court's position, overruling the defense objections to the prosecutor's questions on these points, Doyle was then under a compulsion to answer. In this sense, we rely on the definition of the transitive verb volunteer (which gives rise to the participle "volunteered" as used by the Court) as meaning to offer or bestow without solicitation or compulsion.

If our analysis of the Record is invalid, counsel for the State will direct this Court's attention to those segments of the Record which show, as the Court of Appeals found, that "Doyle volunteered" the basis for the Court's findings.

Also, the Court of Appeals determined, for reasons that can never find any support in the Record, that "the prosecutor had not violated Criminal Rule 16 by not informing

the defense of this rebuttal evidence before trial" (See Appendix, p. 42). It cannot be said more directly, it is simply not a fact the prosecutor only learned after Doyle testified of the statement attributed to him by Beamer.

Even Beamer testified he told the prosecutor of this alleged statement before he testified. This being the fact, one has to wonder as to the basis for the contrary finding by the Court. As to this, it should be the burden of the State to at least direct us to those segments of the Record which support the Court's thesis--since the Court did not itself see fit to do so.

The appellate court's analysis of the Record aside, the testimony of Beamer was rendered after 1:00 o'clock p.m. on October 3, 1973 (R 106). In testifying on the question as to when he supposedly transmitted the Doyle confession to the prosecutor, Beamer's evidence was that he told the prosecutor this either on the morning (i.e., October 3, 1973) or the morning before he testified. Further, Beamer says, he told him again after Doyle testified (R 502).

The defense began its evidence on October 5, 1973 (R 346), and this is the same date Doyle testified. This being the fact, the Court of Appeals' distillation of this testimony into the statement that Beamer "told the prosecutor of the statement on the day before he testified as a rebuttal witness, Thursday, October 4, 1973" (Appendix, p. 47), is an obvious improvisation.

Not only this, the Court's conjuration of the Record is further emphasized by the fact that there is absolutely no support in the Record for their statement crediting Beamer with having said he told the prosecutor this information on the day before he (Beamer) testified as a rebuttal witness.

But even if it were true (as the Court of Appeals convinced itself was the case without the benefit of evidentiary support) that the prosecutor was told on October 4, 1973; the continuing duty to disclose (created under Rule 16[d]) would make non-disclosure even at that point a factor that should have been dealt with by the appellate court.

In this sense, their statement that there was "no showing that the prosecutor was aware of this oral statement... before the trial" (Appendix, p. 47) may be quite instructive. This is so because the relevant consideration is not that he be aware before the trial.

This being the fact, the Court's finding on this point simply cannot be the answer.

III

Where The Prosecutor's Case Rested Almost Exclusively On The Testimony Of A Paid Informant, The Accused Is Entitled To Cautionary Instructions On The Unreliability Of Testimony By A Witness Of This Ilk.

In this case, a serious dispute existed as to whether there had, in fact, been any purchase or sale of marijuana. Hence, the question, simply put, was whether the paid informer and convicted felon, Bill Bonnell, had indeed testified truthfully as to his asserted dealings with Jefferson Doyle.

Since there was no meaningful corroboration for any of Bonnell's testimony, the jury was required to decide if Bonnell could be believed beyond a reasonable doubt.

Most courts, of course, recognize the serious credibility questions inherent in the use of informers. Doubtless it was this reason, and to make sure that witnesses of this type were properly identified as such, that led this Court, in On Lee v. United States, 343 U.S. 747 (1952), to state:

> "The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business' may weigh serious questions of credibility. To the extent that they do, a defendant is entitled to broad latitude to prove the credibility by cross-examination and to have issues submitted to the jury with careful instruction."

Thus, where, as here, the informer's incriminating testimony is uncorroborated or unsubstantiated, in its critical aspects, special cautionary instructions are required. See Orebo v. United States, 293 F. 2d 747 (1961), and Joseph v. United States, 286 F. 2d 486 (1961).

In this case, of course, there was little if any corroboration for Bonnell's version. However, even where the informant's testimony is corroborated, many jurisdictions nevertheless favor instructions which are calculated to call the jury's attention to the inherent untrustworthiness of these informer witnesses. The sufficiency of any instructions depends upon the circumstances that tend to corroborate the informer. In Fletcher v. United States, 158 F 2d 321 (1951), the court held that,

> "granting that the credibility of the testimony of a paid informer is for the jury to decide, it nevertheless follows that where the entire case depends upon his testimony, the jury should be instructed to scrutinize it closely for the purpose of determining whether it is colored in such a way as to place guilt upon the defendant in furtherance of the witness' own interest. Here... the usefulness of the

> witness--and for which he received payment--dependent wholly upon his ability to make out a case. No other motive than his own advantage controlled him in all that he did. Because of this, it was necessary to give special cautionary instructions on his unreliability. Failure to give these instructions is reversible error unless the informer's testimony is fully corroborated by other eyewitnesses." (Emphasis added.) Also see Hardy v. United States, 343 F 2d 233 (1964).

Here, since Bonnell's testimony was virtually uncorroborated in any of its material aspects, the necessity for the special instructions was critical.

Wood's entitlement to an instruction, pure and simple, was based on the inherent untrustworthiness of informers, especially those who become such for ulterior motives. It is beyond dispute that informers of this type create a special problem that jurors must be made aware of.

It is glaringly apparent from Bonnell's testimony that the special cautionary instructions were required, as all the underlying reasons justifying such instructions were surely present here.

Concededly, the court was under no obligation to give the requested instructions in the language submitted by counsel. However, the Court was at least required to incorporate the type of instruction to which the request related in its general charge.

The conclusory finding by the Supreme Court of Ohio, in State v. Flonnoy, 31 Ohio St 2d 124, is a sufficient response to our contentions. Aside from the fact that Flonnoy deals with the testimony of an accomplice, there are other more cogent reasons why the requested instruction was proper for this case. These include the entitlement an accused has to a theory of the case instruction. Here the

theory was that the State's witness had sought to frame the accused. If this is a valid defense, then what is the harm in telling the jury so.

CONCLUSION

This case is an obvious example of the unwillingness of a state's appellate courts to vindicate, at the expense of reversing a conviction, the right of an accused to a fair trial. What really makes this wrong here all the more gross is not the fact that the appellate court must still be totally oblivious to the thrust even of the relevant opinions by this Court, but rather the apparent proneness of the Court to disregard meaningful rights in the process.

It is perfectly understandable why policemen and prosecutors, doubtless because of their narrow and specialized interest, continually urge that only minimum rights should be extended or protected. Viewed in this same light, every right achieved by an individual citizen, represents a diminution of power of the policeman and the prosecutor.

But when a court, as has been the case, goes along with abuses as clear as those in this case, they take a grudging view of the concepts of individual rights--a view so very grudging as to condemn those rights to ultimate extinction.

In this case, the issue (as to Fifth Amendment rights) is clear. When Wood and Doyle were arrested by the police, only one of two things can be true: either the police had the right to extract information from them, or they had a right to remain silent. Both rights cannot be said to have co-existed.

If they had the right of silence, then it follows they cannot properly be penalized for having exercised it. If it were otherwise, then there would be no reason for any policeman to use moderation in his attempt to obtain information from those arrested by him.

The question is one for this Court. The issue is what kind of a society do we want. Do we want to penalize those who exercise the rights we indicate are theirs, or only some of them. The Court's resolution of the issues in this case will surely chart a course that unavoidably will be both clear and precise.

For all of the reasons set forth herein, it is hereby urged that the conviction in this case be reviewed.

Respectfully submitted,

JAMES R. WILLIS, ESQ.
Attorney for Petitioner
1212 Bond Court Building
1300 East Ninth Street
Cleveland, Ohio 44114
216/523-1100

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari was mailed to the office of Ronald L. Collins, Prosecuting Attorney, Tuscarawas County, Court House, New Philadelphia, Ohio 44663, this ___ day of _____, 1975.

JAMES R. WILLIS, ESQ.
Attorney for Petitioner

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

*19*75 *TERM*

To wit: April 11, 1975

State of Ohio,
Appellee,

vs.

Richard Wood,
Appellant.

No. 75-178

MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS

for TUSCARAWAS *County*

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by James R. Willis

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court

this.....day of..... 19.....

.....*Clerk*

.....*Deputy*

SC-10A HARRITT BROTHERS, PUBLISHERS, SPRINGFIELD, OHIO

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,
City of Columbus.

19.75... TERM
To wit: April 11, 1975

State of Ohio,
Appellee,

vs.

Richard Wood,
Appellant.

No. 75-178

APPEAL FROM THE COURT OF APPEALS

for TUSCARAWAS *County*

This cause, here on appeal as of right from the Court of Appeals for TUSCARAWAS *County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.*

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for TUSCARAWAS *County for entry.*

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this.....day of..... 19.....

.....*Clerk*

.....*Deputy*

APPENDIX "C"

IN THE COURT OF APPEALS, FIFTH DISTRICT

TUSCARAWAS COUNTY

STATE OF OHIO	:	JUDGES:
		Hon. Norman Putman, P.J.
Plaintiff-Appellee	:	Hon. Leland Rutherford, J.
		Hon. Paul Van Nostran, J.
vs.	:	
		CASE NO. CA 1109
RICHARD WOOD	:	
		_M_E_M_O_
Defendant-Appellant	:	
		Decided_____
	:	

FILED
COURT OF APPEALS
JAN 6 1975
TUSCARAWAS COUNTY, OHIO
Robert E. Moore, Clerk

APPEARANCES:

RONALD L. COLLINS
Prosecuting Attorney
Court house
New Philadelphia, Ohio 44663
Counsel for Plaintiff-Appellee

JAMES R. WILLIS
1212 Bond Court Building
1300 East Ninth Street
Cleveland, Ohio 44114
Counsel for Defendant-Appellant

PUTMAN, P.J.

This appeal is a companion case to No. 1108, Ohio v. Doyle. By agreement of all counsel, both were argued and considered together for the reason that they arise out of a joint indictment and a single transaction

and although each appellant had a separate trial, both appellants were represented at trial and here by the same skillful and experienced counsel.

Eleven errors are assigned as hereafter set forth. Because all except Nos. #4 and #7 are the same as in the Doyle case (No. 1108) we set forth for the purpose of convenience the appropriate number given the assignment of error in Doyle.

1. The court erred in failing to grant a change of venue. (Doyle No. 2)

2. The court erred in permitting the State, under the guise of refreshing the witness Griffin's recollection, to show a significant segment of an unsigned written report made by another and different officer. (Doyle No. 4)

3. The court erred in permitting the prosecutor to interrogate the witness Doyle in a manner suggesting his (Doyle's) failure to disclose the substance of his testimony, or to otherwise "protest his innocence," at the time of his arrest was a factor that could properly be considered by the jury in determining his credibility. (Doyle No. 5)

4. The court erred in permitting the prosecution to develope through the testimony of the witness Beamer that the defendant refused to consent to the search of the car.

5. The court erred in permitting the prosecution to develope, through his cross-examination of the defendant, that he did not "protest his innocence" upon being arrested. (Doyle No. 7)

6. The court erred in permitting the prosecution to develope, through the cross-examination of the appellant, that he did not "protest his innocence" upon being arrested. (Doyle No. 7) (Notice this is a repeat)

7. The court erred and the appellant was deprived of a fair trial as a consequence of the following circumstances: Pursuant to Rule 16, the prosecutor informed the defense that no statements (admissions or confessions) were made by either the witness Doyle or the appellant. Despite the apparent reliance of the defense on the prosecutor's response, and in spite of his continuing duty to disclose, the Court allowed the State to show that certain crucial admissions werein fact made.

8. The prosecutor was guilty of misconduct in arguing to the jury that the failure of the witness Doyle, and the appellant, to protest their innocence, or to otherwise disclose their defense, earlier than at the trial, and that their failure to consent to a search of the vehicle, were circumstances that could be weighed in arriving at a verdict in this case (Doyle No. 8)

9. The court erred in failing to give, or appropriately incorporate into its general charge, the special request submitted by the appellant. (Doyle No. 9)

10. The court erred in denying the various motions (including, but not limited to the motion for judgment of acquittal) made at the close of all the evidence. (Doyle No. 10)

11. The verdict of the jury is against the manifest weight of the evidence and is contrary to law. (Doyle No. 11).

Our memorandum in the case of Ohio vs. Doyle, Tuscarawas County No. 1108, is incorporated herein by reference and made a part hereof as fully as if rewritten herein in full. Appellant's counsel concedes the state's case in chief was substantially the same in both cases. Counsel concedes and we find that both trials were conducted substantially the same even though Doyle was tried before Judge Rice and Wood was tried before Judge Spies. We move now to consider each assigned error in turn.

1.

No error appears respecting the refusal of the trial court to change venue. No record of the voir dire examination of jurors was presented us. The record we do have recites merely (R. 11) that:

> "Thereupon a jury was duly impaneled and sworn."

Nothing to the contrary appears.

2.

We find no error in the use by the prosecuting attorney of the report prepared by Capt. Griffin and another, to refresh the recollection of Capt. Griffin upon re-direct examination, taking into consideration the nature of the cross-examination. (R. 272 - 289 of the Wood case)

3.

Here Doyle, not on trial, was called by Wood in the defense case in chief. The cross-examination was not improper for the same reasons stated in the Doyle memorandum respecting assignment No. 5 in the Doyle case.

4.

Here the state called the witness Beamer in rebuttal to rebut statements made by the witness Jefferson Doyle when cross-examined by the prosecutor. Doyle (not on trial) was testifying in defense of Wood having been called by the defense. Doyle volunteered in cross-examination by the prosecutor, details of a conversation between Doyle and Beamer at the time of his first confrontation with the authorities, at the time of the transaction in question, the night both Doyle and Wood were arrested. (R. 425 - 429)

This trial of Wood took place in October of 1973 after the Doyle trial had been conpleted in July of 1973.

No similar incident respecting a clash between the testimony of Doyle and Beamer had developed in the Doyle trial.

We find the testimony of Beamer was proper rebuttal to the testimony of Doyle, and that a proper foundation for the same was laid in cross-examination.

The court held a hearing outside the presence of the jury and found the rebuttal proper. (R. 487). A proper instruction limiting the use of the testimony to the purpose of impeachment of the witness was given (R. 488).

The court properly found the prosecutor had not violated Criminal Rule 16 by not informing the defense of this rebuttal evidence before trial (R. 487).

5.

This assignment raises the same legal point as assignment No. 7 in the Doyle case and is overruled for the reasons given there. This was not evidence used in the state's case in chief but cross-examination for the purpose of affecting credibility.

6.

This assignment is an apparent inadvertent repeat of No. 5 above.

7.

This assignment is preculiar to this case and

did not arise in Doyle's case. The appellant here complains that the prosecutor under Criminal Rule 16, said in writing, August 31, 1973,

> "Defendant made no statements at the time of arrest."

The trial of the case commenced in October, 1973. After the defendant Wood, and co-defendant, not on trial, Doyle, testified for the defense, the prosecutor recalled Kenneth Beamer, who had participated in the investigation and arrest of the defendants. He testified (R. 486-494):

> Q ... At any point subsequent to the time you placed Doyle or Mr. Wood under arrest, did you have an opportunity to have a conversation with Mr. Doyle?
>
> A. Yes, sir.
>
> Q. And when did you have such conversation?
>
> A. After the search of the vehicle some time after 6:00 a.m. in the morning I took him back to the county jail. He rode in my car.
>
> Q. Jefferson Doyle?
>
> A. Yes.
>
> Q. And what was the circumstances of that conversation?

MR. WILLIS: Objection.

THE COURT: You may answer.

A. I stated to Mr. Doyle on the way back, I said Jeff, what are you doing in the dope business, and he said, I don't know, Kenny, I don't know. I stated that I had heard there may be more out on Route 39 in a ditch or culvert...

. . . . . .

A. I said if you have more, Jeff, I want it - I want it all. He said there isn't any more. That is all we had with us.

. . . . . .

Q. So it is fair to say, is it not, Mr. Beamer, that he didn't protest his innocence?

MR. WILLIS: Objection.

THE COURT: He may answer.

A. That is correct, sir.

Q. All right, now, referring your attention specifically to Richard Wood, to this defendant did you have an conversation with the defendant Richard Wood?

MR. WILLIS: Objection.

THE COURT: Overruled.

A. Yes.

Q. And Kenny, did you have an opportunity to have any conversation with the defendant, Richard Wood, at that time and place?

A. Yes sir.

Q. When was that?

A. Just moments after we all arrived at the Tuscarawas County Jail.

Q. Advise us what the nature or circumstances of that conversation was.

MR. WILLIS: Objection.

THE COURT: Overruled.

. . . . . .

THE COURT: He asked you when or if you had any further conversations.

A. Yes.

Q. At the same time?

A. Yes.

Q. What was the nature or circumstances of that conversation?

A. I asked Mr. Wood if he would sign a consent to search his vehicle.

MR. WILLIS: Object and more the answer be stricken and the jury instructed to disregard it.

THE COURT: Now I think this witness has testified to that - permission was not given.

MR. WILLIS: I asked that the jury be instructed that no person is required to give consent and no inference can be drawn from that.

THE COURT: The court will instruct the jury that consent was not given nor is there any reasponsibility that consent should be given under the factual set up in this case.

Q. At any time, Mr. Beamer, did Mr. Richard C. Wood protest his innocence to you?

MR. WILLIS: Objection.

THE COURT: Overruled. You may answer yes or no.

A. No, sir.

Q. Kenny, at any time did Mr. Wood indicate to you that he had or felt he was framed or set up?

MR. WILLIS: Objection.

THE COURT: Overruled.

A. No, sir.

. . . . . .

Q. At any time after the time he was placed under arrest thru the period of the subsequent investigation that morning did Mr. Richard Wood tell you that he was innocent - that he had been set up or framed, or both?

THE prosecutor: Not for that entire period of time.

THE COURT: You may answer yes or no.

A. No, sir he did not. (R. 486-494)

Agent Beamer testified he had not written a summary of his conversation with Doyle and he had not told the prosecutor of his oral statement at the time defendant-appellant requested discovery (R. 496-497) and he further added he only told the prosecutor of the statement on the day before he testified as a rebuttal witness, Thursday, October 4, 1973, the third day of the trial, after he had already testified as a state witness in its case in chief.

We find no showing that the prosecutor was aware of this oral statement to Agent Beamer before the trial of the case. (R. 515-516).

8.

We find the prosecutor was not guilty of misconduct in arguing to the jury the issue of credibility of the witness Doyle and the witness defendant Wood

and pointing to their failure to assert their narratives at the earliest opportunity.

The same reasons apply here as in the eighth assignment in the Doyle case.

9.

The cautionary instruction respecting the testimony of the state's witness Beamer was properly refused. State v. Flonnory, 31 O.S. 2d. 124, paragraph 4 of the syllabus.

10. & 11.

We find from a careful reading of the record that the judgment is not against the manifest weight of the evidence and not contrary to law.

For the foregoing reasons all eleven assigned errors are overruled, the judgment of the Court of Common Pleas of Tuscarawas County is affirmed and this cause is remanded to that court for execution of sentence.

Rutherford, J. and Van Nostran, J. concur.

Norman J. Putman

Paul Robert Hunter

Leland Rutherford

JUDGES

IN THE COURT OF APPEALS, FIFTH DISTRICT

TUSCARAWAS COUNTY

STATE OF OHIO	:	
Plaintiff-Appellee	:	JUDGMENT ENTRY
	:	CASE NO. CA 1109
vs.	:	
RICHARD WOOD	:	FILED
Defendant-Appellant	:	COURT OF APPEALS
	:	JAN 6 1975

TUSCARAWAS COUNTY, OHIO
Robert E. Moore, Clerk

For the reasons stated in the memorandum on file, all eleven assigned errors are overruled. The judgment of the Court of Common Pleas of Tuscarawas County is affirmed and this cause is remanded to that court for execution of sentence.

Norman J. Putman

Edward A. Hoffman

Leland Rutherford

JUDGES.

APPENDIX "D"

IN THE COURT OF COMMON PLEAS OF TUSCARAWAS COUNTY, OHIO

CASE NO. 10657

JUDGMENT ENTRY ON VERDICT

(Filed October 18, 1973)

On the 2nd day of October, 1973, this cause came on for trial by Jury and the defendant was present in Court throughout said trial, represented by his Attorneys, James Willis of Cleveland, Ohio, and John James of Akron, Ohio. Prosecuting Attorney Arthur B. Cunningham and Assistant Prosecuting Attorney James C. Shaw represented the State of Ohio. Said trial began on the 2nd day of October, 1973, and continued through the 9th day of October, 1973.

The Jury, having been duly impaneled and sworn, and having heard the opening remarks of the Prosecuting Attorney for the State of Ohio, and those of Attorney Willis, counsel for the Defendant, the testimony and evidence adduced and submitted by the parties hereto, including exhibits, the arguments of the Prosecuting Attorney and counsel for the defendant, and the charge of the court' and after due deliberation thereon, finds that said defendant, Richard C. Wood, is guilty of sale of an hallucinogen, as set forth in the Indictment filed against him.

The Court thereupon inquired of either party if there was a request that the Jury be polled as to its verdict, and the defendant having requested that the jury be polled, each of said jurors was polled as to whether or not this was his or her verdict and said verdict was thereupon confirmed. It is so ordered.

It is further ordered that the bond of the defendant be continued and this matter is continued for sentencing on October 29, 1973, at 11:00 A.M.

/S/ HARLAN R. SPIES
JUDGE, COMMON PLEAS COURT

JUDGMENT ENTRY ON SENTENCE

(Filed October 30, 1973)

On the 29th day of October, 1973, this matter came on for hearing in open Court on motions filed for a New Trial or Judgment of Acquittal, by the defendant, and sentencing. The defendant, Richard C. Wood, was present in Court represented by his attorneys, James Willis of Cleveland, Ohio, and John James of Akron, Ohio. The State of Ohio was represented by Prosecuting Attorney Arthur B. Cunningham.

Whereupon the Court, having heard the arguments of counsel for the defendant and those of the Prosecuting Attorney for the State of Ohio, finds the defendant's Alternative Motion for a New Trial or For a Judgment of Acquittal not well taken and the same is hereby overruled.

Thereupon this matter came on for sentencing. The Court heard the statemens made by the Prosecuting Attorney on behalf of the State of Ohio, and also the statements of counsel for the defendant, and the Court having personally inquired of the defendant whether or not he wished to make a further statement on his own behalf or present any additional information in mitigation of punishment, and the defendant having personally addressed the

Court, the Court did then, and does hereby order, adjudge and decree that the defendant, Richard C. Wood, be sentenced to the Ohio State Penitentiary for an indeterminate period of not less than twenty (20) nor more than forty (40) years, there to remain until pardoned, paroled or otherwise released according to law.

The defendant's Application for Bail Pending Appeal is denied, and the defendant is remanded to the custody of the Tuscarawas County Sheriff.

It is further ordered that the defendant pay the costs herein taxed at $_____, and that a warrant be issued to the Sheriff of this County to convey said defendant to the Ohio State Penitentiary.

/S/ HARLAN R. SPIES
JUDGE, COURT OF COMMON PLEAS

APPENDIX "E"

IN THE COURT OF APPEALS, FIFTH DISTRICT

TUSCARAWAS COUNTY

STATE OF OHIO	:	JUDGES:
Plaintiff-Appellee	:	Hon. Norman Putman, P.J. Hon. Leland Rutherford, J. Hon. Paul Van Nostran, J.
vs.	:	
JEFFERSON DOYLE	:	CASE NO. CA 1108
Defendant-Appellant:		M E M O
	:	Decided_____

APPEARANCES:

RONALD L. COLLINS
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FILED
COURT OF APPEALS
JAN 6 1975
TUSCARAWAS COUNTY, OHIO
Robert E. Moore, Clerk

PUTMAN, P.J.

This is an appeal in a criminal action from a sentence for illegal sale of marijuana in violation of R.C. 3719.44(D). Appellant was jointly indicted

with Richard Wood but tried separately. Wood's appeal is our separate case number 1109.

Twelve errors are assigned as follows:

1. The court erred in denying the appellant the opportunity to show that certain electors were improperly excluded in connection with jury service.

2. The court erred in failing to grant a change of venue.

3. The court erred in restricting the cross examination of the witness Bonnell as to his possible drug addiction.

4. The court erred in permitting the State, under the guise of refreshing the witness Griffin's recollection, to show a significant segment of an unsigned written report made by another and different officer.

5. The court erred in permitting the prosecution to interrogate the witness Wood in a manner suggesting his (--i.e.,Wood's) failure to disclose the substance of his testimony, or to otherwise "protest his innocence", at the time of his arrest was a factor that could properly be considered by the jury in determining his credibility as a witness.

6. The court erred in permitting the prosecution to develope through the testimony of both the witness Wood and the appellant, that they refused to consent to the search of the car.

7. The court erred in permitting the prosecution to develope, through the cross examination of the appellant, that he did not "protest his innocence" upon being arrested.

8. The prosecutor was guilty of misconduct in arguing to the jury that the failure of the appellant to protest his innocence, or to otherwise disclose his defense earlier than at the trial of Richard Wood, and that his failure to consent to a search of the vehicle, were circumstances that could be weighed arriving at a verdict in this case.

9. The court erred in failing to give, or appropriately incorporate into its general charge, the special requests submitted by the appellant.

10. The court erred in denying the various motions (including, but not limited to the motion for judgment of acquittal) made at the close of all the evidence.

11. The verdict of the jury is against the manifest weight of the evidence and is contrary to law.

12. The prosecutor was guilty of misconduct in arguing to the jury his personal opinion as to the guilt of the appellant.

We find the State's evidence, if believed, was sufficient to show beyond a reasonable doubt the following as set forth in appellee's brief:

In April of 1973, William Bonnell, an informant of the Multi-County Narco Bureau and a convicted mine

rioter free on bond pending various appeals, made contact with a man by the name of Vincent Cercone, who told Bonnell he could set up or help set up a transaction for a large quantity of marijuana (as it turned out, 10 pounds). On the evening of the 28th of April, 1973, Mr. Bonnell got a telephone call from Jefferson M. Doyle proposing to sell Bonnell 10 pounds of marijuana for $175 a pound, or a total of $1750. Arrangements were made to meet in the Cloverleaf Tavern in Dover, Ohio. Bonnell reported this telephone conversation to the Multi-County Narco Bureau which then tried to gather $1750, but only succeeded in raising $1320. This money was photocopied so it could be traced. Bonnell then proceeded in his pickup truck to the point where he had prearranged to meet with Mr. Doyle. From and after the time Mr. Bonnell met Mr. Doyle and also Mr. Richard Wood in Dover, he was at that time and from then on under constant surveillance by an agent from the Multi-County Narco Bureau, Kenneth Beamer, Agent in charge of Multi-County Narco Bureau, Captain Jack Griffin of the Dover Police Department, Chief Deputy Hobert White of the

Tuscarawas County Sheriff's Department and several others.

At approximately 12:30 to 1:00 A.M., Mr. Bonnell was seen by the agents and deputies conducting the surveillance, leaving the Cloverleaf Tavern and going across the street to Nickie's Tavern. Mr. Bonnell was then seen leaving this tavern in the company of Richard Wood. Mr. Doyle was at this time going to pick up the marijuana which was stashed in a culvert on Route 39. Bonnell and Wood got in Bonnell's truck and proceeded across Tuscarawas Avenue to New Philadelphia, Ohio. They parked the pickup truck on North Broadway just north of Beech Lane, near the Club 224 on North Broadway in New Philadelphia.

A very short time later the officers who conducted the surveillance observed a 1973 Oldsmobile Cutlass, driven by Jefferson Doyle, pulled up beside or to the rear of the Bonnell pickup truck. Mr. Doyle flashed his lights. The pickup truck proceeded into the rear of the parking lot of the 224 Club and both vehicles then were in the 224 Club parking lot. Captain Griffin, one of the officers conducting the surveillance,

observed Mr. Bonnell receiving a large brown paper bag through the window from Mr. Doyle and saw Mr. Wood get out of the pickup truck and get in the car with Doyle. At this time the parties separated and both vehicles turned right on Second Drive and proceeded North. The surveillance was continued and Doyle and Wood were followed on their route through New Philadelphia. A few minutes later Mr. Doyle and Mr. Wood were arrested for the sale of marijuana to Mr. Bonnell by Agent Beamer of the Multi-County Narco Bureau. In the meantime Mr. Bonnell had surrendered himself and the brown paper bag to the authorities. It was found to contain ten (10) pounds of cannabis sativa L. (marijuana).

After Doyle and Wood were arrested, Agent Beamer contacted Mr. Arthur B. Cunningham, Prosecuting Attorney of Tuscarawas County, for aid in preparing an affidavit for a search warrant, which warrant was approved by Judge Raymond C. Rice. This warrant was served and executed upon Doyle and Wood. Mr. Beamer, in the presence of Doyle

and Wood, went to the place where the 1973 Cutlass had been stopped and under guard until the warrant was obtained, and searched the automobile. Mr. Beamer discovered, under the floor mat on the passenger's side of the car, a wad of money. The money was immediately examined by Mr. Beamer and checked against the list of money he had previously copied and he noted that it was the same money he had earlier given to Mr. Bonnell.

We consider each assigned error in turn.

1.

No "refusal to allow exploration into" the system of jury selection appears in the record. Appellant's counsel did not ask to "explore" or produce evidence. He made a brief legal argument respecting certain journal entries and concluded saying (R. 8):

"Thats all we have on that motion Your Honor."

2.

There is no error demonstrated respecting a failure to change venue. There is no record of the voir

dire examination of prospective jurors. The record says simply (R. 122 A):

> "Thereupon a jury was duly impaneled and sworn."

This recital is conclusive upon us in the absence of an affirmative showing to the contrary. None has been made.

3.

Cross examination of the witness Bonnell respecting his possible drug addiction was not erroneously restricted. Appellant was represented by skilled counsel who abandoned this subject before he really ever got started upon it, after a few questions about past use of benzedrene. The court asked counsel to show relevance whereupon the inquiry was suddenly dropped. (R. 178, 179).

(By Mr. Willis)

Q. You used drugs, didn't you?

MR. CUNNINGHAM: Objection, Your Honor.

THE COURT: Sustained.

Q. Mr. Bonnell, in your life have you ever used narcotics?

MR. CUNNINGHAM: Objection.

THE COURT: Sustained.

Q. You know what narcotics is, don't you?

A. Yes.

Q. Now specifically referring to benzedrine, do you know what that is?

MR. CUNNINGHAM: Objection, Your Honor, we are talking about 10 lbs. of marijuana.

MR. WILLIS: We are talking about his credibility too.

THE COURT: Objection will be sustained.

Q. Did you ever testify that you use narcotics, Mr. Bonnell?

MR. CUNNINGHAM: Objection!

Q. Isn't it a fact that you testified that you used --

MR. CUNNINGHAM: Objection!

MR. WILLIS: (Continuing) Benzedrine?

MR. CUNNINGHAM: Object!

THE COURT: It appears irrelevant unless it can be shown otherwise the objection will be sustained. (R. 178).

The State's witness Captain Griffin, when cross examined by appellant's counsel respecting his surveillance of the "sale" (R. 362-3):

> Q. Now, when you finally came to a stop, you said you saw the informant standing with a package under his arm?
>
> A. Yes.
>
> Q. Did you see where the package came from?
>
> A. He was standing on the passenger side, -- driver's side of the automobile, and -- no, he came from the car but I couldn't see.

Thereafter, upon re-direct, (R. 371) the prosecutor asked him about a report (State's Exhibit 11) which Griffin then identified as the report of the transaction prepared by himself and Hobert White (R. 371 lines 6 & 7) and testified, in substance, that he said in the report what he had just said on the witness stand.

We find this was justified by the challenging manner of the cross examination. No error appears. See Harris v. New York, 401 U.S. 222 (1971).

5.

Although Richard Wood was not on trial here, he testified as a defense witness for appellant Doyle. He gave a detailed narrative calculated to exculpate Doyle. He was cross examined by the prosecutor in such a manner as to demonstrate he had not told this story at his first or other earlier opportunities.

We find no error. This is proper cross examination bearing upon the credibility of the witness.

6.

Both appellant Doyle, after he testified on direct as a witness for himself in his own case in chief, and his co-defendant Wood who (although not then on trial) appeared as a defense witness, were cross examined in such a way as to develop the fact that upon first confrontation with the authorities they did not consent to a search of the car.

This was not a subject adduced by the state in its case in chief offered as substantive evidence of guilt but rather cross examination of a witness bearing

upon the limited purpose of credibility. Concededly this could not have been shown in the states case in chief but used as it was on this state of the record for this limited purpose, it was not error.

7.

After the defendant-appellant took the stand and testified in detail as to a narrative of events he claimed to be exculpating, he was cross-examined by the prosecutor, in substance, as to why he did not give this same account when first confronted by the authorities (R. 504 - 508).

This was not evidence offered by the state in its case in chief as confession by silence or as substantive evidence of guilt but rather cross examination of a witness as to why he had not told the same story earlier at his first opportunity.

We find no error in this. It goes to credibility of the witness.

8.

This assignment goes to the fact that the

prosecutor argued to the jury the facts he developed on the cross-examination of the defendant Doyle and his witness Richard Wood which have been discussed in assignments 5, 6 and 7.

There we held the matters were not improperly shown and here we hold they were not improperly argued to the jury.

9.

The ninth assignment of error complains of the refusal of the trial court to give the jury a "cautionary" instruction respecting the testimony of the witness Bonnell, a claimed participant in the illegal sale.

We find no error. In State v. Flonnory, (1972) 31 O.S. 2d. 124, the fourth paragraph of the syllabus reads:

> "4. An instruction to the jury in a criminal case that the testimony of an accomplice is to be "acted upon with the extreme caution" is improper as constituting a comment upon the evidence."

We hold that rule governs here.

10. and 11.

From a careful reading of the record, we find the judgment is not against the manifest weight of the evidence and not contrary to law.

The state's chemist testified that the substance sold was "Cannabis Sativa" commonly knows as marijuana. Appellant argues the state loses unless the witness says the magic letter "L" thereafter, sic, "Cannabis Sativa L". This argument is not well taken. It is clear that the legislature intended by the use of the capital letter "L" after the words "cannabis sativa" to indicate the system of botanical classification.

12.

It is not true in fact that the prosecution at R. 527 or elsewhere, expressed a personal opinion upon the issue of innocence or guilt, or upon the credibility of any witness, nor did he otherwise by his argument, put his own credibility or prestige in the community into the balance.

For the foregoing reasons all twelve assigned errors are overruled, the judgment of the Court of Common Pleas of Tuscarawas County is affirmed and this cause is remanded to that court for the execution of sentence.

Rutherford, J. and Van Nostran, J. concur.

Norman J Putman

Paul R. Van Nostran

Leland Rutherford

JUDGES.

IN THE COURT OF APPEALS, FIFTH DISTRICT

TUSCARAWAS COUNTY

STATE OF OHIO	:	
Plaintiff-Appellee	:	JUDGMENT ENTRY
	:	CASE NO. CA 1108
vs.	:	
JEFFERSON DOYLE	:	
Defendant-Appellant	:	
	:	

FILED
COURT OF APPEALS
JAN 6 1975
TUSCARAWAS COUNTY, OHIO
Robert E. Moore, Clerk

For the reasons stated in the memorandum on file, all twelve assigned errors are overruled. The judgment of the Court of Common Pleas of Tuscarawas County is affirmed and this cause is remanded to that court for the execution of sentence.

Norman J. Putman

Paul R. Wise

Leland Rutherford

APPENDIX "F"

STATE OF OHIO vs. RICHARD WOOD - No. 10657

TUSCARAWAS COUNTY, OHIO

OPINION OF THE TRIAL COURT FOLLOWING ARGUMENT OF PROSECUTING ATTORNEY on October 29, 1973 in re: MOTION FOR A NEW TRIAL AND FOR JUDGMENT OF ACQUITTAL.

BY THE COURT:

There is filed with this court a motion containing two branches - first that of a Motion for a New Trial and a motion for a Judgment of Acquittal.

After hearing the arguments of counsel, maybe it would be wise for the court to say he too sat thru this trial and it is amazing how opinions can differ. But the record must stand as it is and we will all have to live with it.

In the motion for a New Trial, the first point raised by the defendant was that the court erred in denying the pretrial motion to suppress illegally seized evidence.

The second branch is tied into the first branch following up by the fact that if it was illegally seized, the records of seizure cannot be used in court. This matter was argued before Judge Rice and the court does not have the benefit of those arguments, however this court will stand upon the ruling that was handed down on the issue of whether or not it was illegally seized evidence as ruled

on by Judge Rice and since his ruling was that the evidence was legally seized, this court will overrule Branch 1 and 2 as it relates to the motion for a New Trial.

The Third Branch goes to the court erred in admitting certain hearsay and other incompetent evidence. The court has reviewed its records and the court is without benefit of argument, on this particular point, and the court will stand upon the record and overrule Branch 3 of the motion for a New Trial.

As to Branch 4, the court erred in admitting testimony of State's witnesses, Bonnell and Beemer, tending to show how Bonnell was sought by a hit man - that is a hired killer. The court feels there was no prejudicial error in allowing that testimony to go into the record.

As to Branch 5, the court erred in restricting defense cross examination of several prosecution witnesses. The court is of the opinion that each of the witnesses presented by the State of Ohio were thoroughly and skillfully cross examined by Attorney Willis and the court feels that branch should and will be overruled.

The court erred in permitting the State, under the guise of refreshing the witness Griffin's recollection to show a significant segment of an unsigned written report made by another and different officer, The court has thought about this branch. As the court recalls, there was a request on

behalf of the defendant to play back tape which represented the record in the county court where the preliminary hearing was held to show the statements of the Witness Griffin. The state did present a paper which was marked but the same was denied by the court to go to the jury and the court feels that the witness Griffin was thoroughly interrogated and that his testimony was shown both in the record at the preliminary hearing and as he testified at this trial and the court is hard pressed really to see where the defendant has been prejudiced in any way thru the testimony of Mr. Griffin. Branch 6 will be overruled.

Branch 7 goes to the heart of one of the arguments of the defendant and that is the interrogation of Witness Doyle relative to his failure to protest his innocence at the time of the arrest or thereafter. The court will reserve ruling on No. 7 at this time.

Now we will go to No. 8. The court erred in permitting the prosecution to develop through the testimony the witness Doyle, and the defendant, that they refused to consent to the search of the car. The basis upon which the search was made or a search warrant secured are matters that have to be explained and settled before the trial and it was done in this case and as it ought tobe. The court feels it was incumbent on the State of Ohio to get some evidence out here relative to the fact that a search was necessary

and the court doesn't feel that the defendant was prejudiced. The court felt there might have been a further explanation of that and I think it was handled with as meager testimoy as possible in order to establish points which the State had to substantiate.

Branch 9 - the court erred in permitting the prosecution to develop, through his cross examination of the defendant, that he did not protest his innocence upon being arrested. This, of course, is tied in directly to the same ground as listed in No. 7 and the court will defer ruling on that at this time.

Branch 10 - The prosecutor was guilty of misconduct in arguing to the jury that the failure of the witness Doyle, and the defendant, to protest their innocence, or to otherwise disclose their defense, earlier than at the trial, and that their failure to consent to a search of the vehicle, were circumstances that could be weighed arriving at a verdict in this case. The court will reserve ruling on this at this time as in Branch 7 and 9.

Branch 11 - The court erred in permitting the witness Beemer to testify on rebuttal without a proper foundation that the witness Doyle admitted to him they had brought the contraband involved in this case into the county. The jury was instructed as to the limited purpose for which this testimony was received and I believe that

they did follow the instructions of the court. I think it is further amplified by the fact that the jury spent some four hours in arriving at a decision in this case. I think it points up to the fact the jury was responsible. The court is of the opinion that the prosecutor testified that he did not have knowledge of the statement that Mr. Beemer made in this trial until shortly before he made it. Therefore the Court will overrule Branch 11 but I will say this - that if the court had any evidence there was prior knowledge by the State of this statement then the court would have felt it was a prime issue and overruled or granted a motion for a new trial onthis issue alone.

As to Branch 12 - the court erred in failing to give, or appropriately incorporate into its general charge, the special request submitted by the defendant. It is a matter of record now that the requests were denied for speical instruction, primarily upon the ruling of the court that these instructions were incorporated in with the general charge. We will leave the decision of whether or not the court erred to another day and another court and the court will overrule Branch 12 of the motion for a New Trial.

As to Branch 13, again Mr. Willis as intelligent and competent defense counsel, puts this in. I don't

feel it was needed for an appeal in the event he decides to take an appeal. The court will overrule that branch as of this time.

As to Branch 14 - the verdict of the jury is against the mainfest weight of the evidence and is contrary to law. This is a general complaint which again a good and conscientious counsel will put in their motion for a new trial and the court having sat in the case, feels that branch should be overruled.

Now going back to Branch 7, 10 and 9, now there is a definite difference of opinion here as to what the evidence was between the prosecuting attorney and counsel for the defendant. What we have in this case is the State of Ohio versus Richard Wood and there is a case State of Ohio versus Jefferson Doyle. Jefferson Doyle came into this court as a witness. Therefore there are different rules that apply to a witness than to a defendant. Now upon this issue of statements by Mr. Beamer made in this court relative to statements made to him by Jefferson Doyle, the court has specifically instructed the jury relative as to what purposes and how it should be received. The court believes that the question was never put to Mr. Wood about his protest of innocence but the court does believe that this question was put to Mr. Doyle. There is a difference or at

least there is in the court's mind. The court believes that the jury was properly instructed upon the receipt of this particular bit of evidence.

Now Branch 9 again goes to the cross examination of the defendant. Again the court does not agree with the contention that the defendant was inquired about his protest of innocence in this matter. This was brought up to the attention of Doyle.

As to the argument to the jury, agai n the court believes that the argument of the State relates to the acts and actions of Doyle directly and without direct reference to the defendant. I am sure Mr. Willis will disagree with that but in looking over all of the issues here sometimes we get so technical that we lose sight of what we are here to do. The court feels that the most important thing in any trial is to get at the truth of the matters and to see that the defendant has a fair trial. The court believes that Mr. Wood did receive a fair trial, was adequately and properly represented by counsel and that the issues were brought before the jury clearly, giving rise for the jury to spend "X" number of hours in deliberating and finally coming back with their verdict, so the motion for a new trial will be overruled in its entirety.

Now we go to Branch 15 which the court is going

to consider separately because I think it must - that is the judgment of acquittal. No. 15 reads very simply but forcibly - There is insufficient evidence as a matter of law to support the verdict in this case.

The court will overrule this motion for judgment of acquittal. The jury spent hours and we will let it stand as it is.

Now the court will grant exceptions to the defendant herein. I don't think you need them, but I will grant them anyway.

Now we will get to the next proposition and that is simply this. That at the time the verdict was returned in this case the court set the date of October 29 for sentencing in this matter.

(Defendant sentenced)

APPENDIX "G"

STATE OF OHIO, TUSCARAWAS COUNTY, SS

IN THE COURT OF COMMON PLEAS

The State of Ohio,

Plaintiff,

No. 10657

vs.

Richard Wood,

Defendant.

CLOSING ARGUMENT OF

THE PROSECUTOR

FILED
COURT OF APPEALS
MAY 21 1974
TUSCARAWAS COUNTY, OHIO
Robert E. Moore, Clerk

BY THE PROSECUTOR:

May it please the court, ladies and gentlemen of the jury, at this point in the case the evidence is all in. The case has been concluded in so far as any further testimony or exhibits are concerned.. At this point, ladies and gentlemen, you are entitled to get the benefit of counsels thinking, both for the State of Ohio - myself - and for the defendant, on what we feel the evidence proved.

It is called a summation or closing statement. It is here -- It is here we tell you what we feel are essentials to our respective sides of the law suit.

Now the first thing I want you to remember and I want you to heed me and listen carefully. In this case you had the opportunity to observe one of the finer defense lawyers I have had the opportunity to participate with in the trial of a law suit, Mr. James Willis from Cleveland, Ohio. He is very personable and very able. He made a very fine presentation, but ladies and gentlemen, this case, as any case, is not the case of James Willis against Arthur B. Cunningham. This case is for real. This case is not a television presentation. This case is not fun and games. This case is not a contest of wills or personalities or court room expertise. This case is alive because it happened. It is your very heavy responsibility this day to decide this case on the facts of the case and not on the brilliance or exhaltations of the lawyers involved.

Now I said in opening statement, ladies and gentlemen, that this case was simple. A very simple case. A simple business trans-

action. A deal for a price stated. Terms negotiated. The goods is presented and delivered. The price is paid. I haven't changed my mind a bit. You heard a lot of testimony and a lot of evidence and a lot of objections. Maybe even a little hassle on the case, but ladies and gentlemen, here is what we are dealing with. One, two, three, four, five - over ten pounds. Ten pounds of marijuana. That is a lot of marijuana. That makes a lot of cigarettes to get peddled in our community. Over $4,000 worth on the street. To our youngsters and other members of our community - $4, 000. Ten pounds. It is big money. It is not fun and games. It is a drug. A dirty, filthy, illegal drug.

So when you retire to the jury room, please think about the case on the facts and on what we are dealing with and not extraneous matters.

Now about the case itself, as I said, it is a simple case. It is a classical case and I am going to say one more word or a few more words about the defense. It is a classical case in this sense - of how the defense was presented. What are the basic and simple facts in this case?

Contact was made by William Bonnell or by Jefferson Doyle thru the good offices of one Vince Circone who set up a deal for a large amount of marijuana. You will remember the evidence. Jefferson Doyle, after having talked to Vincent Circone, called William Bonnell and set up the transaction to take place in Dover. Doyleadmitted making the call - all right. He had to. Phone records - subpoenable. Of course. Jefferson Doyle and Richard Wood both admitted it. Jefferson Doyle even went to the point he admitted trying to buy marijuana. Mr. Wood

admitted that he rented the car that was used that day. All admitted. Why? Why go so far? Why did Mr. Doyle take the stand. They admit everything they have to admit and that is why I say it is a classical defense. They admitted everything in the case that can be proved by third party witnesses , proven by records and other facts. Mr. Doyle goes so far as to admit - yes, I offered to buy but the deal didn't take place.

He admits everything up to a point where he can be charged with something. Very carefully done. Very carefully done by the defense. They are very careful, as possibly they can be, not to impune the credibility of the law enforcement officials. They admit everything they have to admit so as not to have to impune or undermine the credibility of our local law enforcement officials. Because they know that members of a community such as ours, want to believe in the efficacy and effectiveness of our law officials. They admit everything except the crucial point. Guilt. It makes for having a very careful defense.

So in that sense, ladies and gentlemen, it is a classical defense.

But what are the real facts? Now one of the State's principal witnesses is William Bonnell, who I stated to you on voire dire and who I stated to you in opening statement, is not the most outstanding or sterling character we have had the opportunity to run across. He is not. He is not one of the most outstanding or sterling characters in our community. I am not going to defend or apologize for William Bonnell but when you consider this case, you analyze his testimony in the light

of the facts in this case. First, dealing in narcotics is a goopy, miserable business. You simply do not buy narcotics or marijuana in Sunday School. You don't buy it at the corner drug store. Essentially the determination of the facts and the prosecution of marijuana dealers happens on the street. The enforcement of the laws is done in an under cover way and our law enforcement people use informants or whatever you might call them because information is not turned over freely or voluntarily to law enforcement people.

As Prosecuting Attorney, I would be the last to know if John Jones or Bill Smith was dealing in narcotics so the business has to be infiltrated by people who are street people, who have the contacts on the street, and who are trusted by dope peddlers.

Now did Mr. Doyle or Mr. Wood make a deal with someone they didn't know and who they felt would turn them in? No. They felt perfectly safe in dealing with a convicted felon. A man such as Mr. Bonnell, having such a back ground as William Bonnell. Of course. He was challenged as we expected he would be challenged. But when you go to the Jury Room and enter upon your deliberations, ask yourselves whether or not he was shaken one iota on the basic facts of this deal. Not one basic fact was he shaken upon so far as the facts of the actual transaction itself.

And ladies and gentlemen, there is corroboration. We have the transaction witnessed or observed by two law enforcement officers. Over at the site was Chief Deputy Sheriff under Sheriff Lew Clark and Captain Jack Griffin of the Dover Police Department. Both observed

the transaction. We have an additional corroborative fact. The money in part was marked prior to the transaction taking place. The money marked was found in the Doyle-Wood vehicle under the mat where Mr. Wood was riding.

There is another little thing I want to say. Mr. Wood admitted he gathered up the money and stuck it under the mat. The reason he admitted it was because he was seen by law enforcement officers doing it. Once again very careful not to challenge the basic credibility of law enforcement officials. If we can't rely on them, who can we rely on? So they have to find an explanation of how the money got under the mat in the front seat of the automobile.

So ladies and gentlemen, that is simple. You make up a cock and bull story and say William Bonnell got in the car and threw it in the back seat . No one noticed it until after they left and discovered the money in the back seat of the car, at which time they decided something unusual must have happened.

I will tell youwhat happened. They had the money in their possession because they sold it to Mr. Bonnell. They had the money in their possession and proceeded to count it. They found out that it was some Four Hundred Dollars short. Naturally they are not very happy about the matter. They made a deal for $1750.00 and counted only $1320.00 so instead of proceeding out Ray Ave., left on 39 to where they had told Mr. Bonnell they had the marijuana, they turned right on Beaver Ave. and proceeded back to look for William Bonnell. Not to run around and chase him and find out and give the money back but to find out why

he dind't give them what they asked for it initially, at which time they made the mistake - they were caught because they were under surveillance the entire time by our local law enforcement officials. Now isn't that the case, ladies and gentlemen? It is.

Don't be when you go into the jury room - don't permit your attention to be distracted by anything but the facts in this case. When you are considering the question of Bonnell and I know you will. Like I say, we don't think much of Bill Bonnell in this case, and when considering the question of Bill Bonnell and what he had to gain and what he had to lose by going to Narco. He notified Narco of this transction. He, thru Narco, arranged for this money. He knew that there were at least a half dozen officers who would be continually having him under surveillance. He knew it was a controlled situation. Would he have in light of what waspending, that is his motion for shock probation - would he have taken a chance to pull such a double cross? Certainly not. Certainly not. He neither has the brains or the guts to make such a set up, as defense would have you believe he did.

So in the last analysis you think about it. In the last analysis who has the reason to lie the most? Mr. Doyle or Mr. Wood who rented the vehicle, who rode with Mr. Bonnell to keep a eye on him while Mr. Doyle went off to get the marijuana. Mr. Wood who counted and concealed the money - Mr. Doyle who arranged for and obtained the marijuana. Who has the reason to lie in these circumstances? The only thing that went wrong with this deal, and think about how a wholesaler as Mr. Doyle and Mr. Wood, of marijuana use the wholesaler. He is

not a dummy on the street who peddles it on the street for $20.00 a bag to our kids in this county- who peddle it in what they call little baggies for about $20.00. They are the ones who take the risk. What went wrong in this deal was these fellows handled this way. They make the arrangments generally thru an intermediary - they come in and protect themselves when here. They are the ones making the big money. They are the ones that make the big money for very little risk. They are not the dummies on the street peddling nickel and dime bags to the young people in this county. They are the ones making big money for a minimum amount of risk.

So ladies and gentlemen, think about who has reason to lie and when you go to the jury room think about why we have to stop the drug traffic in this county. Think about the case in terms of facts. Not the extraneous, the performance of the lawyers in this case. Think about the responsibility you have, ladies and gentlemen, and return a guilty verdict against Richard Wood, because he is guilty.

THEREUPON Mr. Willis argued the case for the defense.

BY THE COURT:

Now Mr. Cunningham, do you want to give your final argument?

BY MR. CUNNINGHAM:

Yes, I do, Your Honor. Thank you very much. May it please the court, ladies and gentlemen of the jury, I hope to be brief. I want to thank Mr. Willis for his kind remarks. He is the kind of lawyer youhave to like because he is professional and very tallented.

There are a few points I want to treat with briefly. Once again

ladies and gentlemen, it is not the lawyers. It is not the lawyers. Your responsibility as jurors is not evaluate the lawyers performance or whether you like them or not. Your responsibility is to evaluate the case on the evidence and the facts.

Once again, ladies and gentlemen, I want to remind you that this is a simple case. We are not dealing with all these personal matters - all this extraneous material. All this talk about liars and purgers. Who did what and who didn't do what and you didn't say what. We are dealing with the basic facts of what happened in this case.

Mr. Willis spent entirely an hour going over this thing once again. Sometimes perhaps you feel like you are on a teeter-totter. One way and then the other. I am going to touch on some of the things he raised.

Would you buy a car or would you buy a house from William Bonnell? Now that is a legitimate question to ask because you know you wouldn't. You would. I agree. But we are not dealing with a car or a house or a co-signer on a note. We are dealing with this stuff, an hallucinogen, a drug, a narcotic. It is against the law. It is dope. No, I don't suppose any of us would buy a car off Mr. Bonnell. But if you are a whole sale dealer in marijuana, do you go to the president of a bank, a minister of your church, your children's Sunday School teacher, your family doctor, your lawyer? Who do you go to when you are trying to sell dope for a profit. When you are wholesaling it? When you are in big money? Who do you go to? Y ou go to William Bonnell. Why? Why? Why did Mr. Doyle and Wood trust Mr. Bonnell - they

didn't trust him very much but they trusted him enough. Enough to unload $4,000 - better than $4,000 worth of marijuana on him. I am sure they assumed he would turn around sell it for a big profit. There is a big difference between $1700 and $4400 and that is an incentive they thought Mr. Bonnell would like. For $1750 he could make - what is the difference? They knew or thought they knew - he is not a family doctor, not their school teacher - he is William Bonnell. They thought they had a safe bet set up. They were wrong.

Mr. Bonnell turned informant and he had his own reasons for doing so, which we never denied but he made the 23 cases Mr. Beamer testified to in this county and others, and he made this one.

Whatever his motivations were that made him do it, they got caught. Let's not talk about buying a car from him. Of course you wouldn't.

You are here to consider if Mr. Woods is guilty or not. Think about it. Could this deal have gone down but for Richard Wood? They trusted Bonnell enough - not very much, but enough. Mr. Woods was present at the first meeting at the bar while they sat discussing the question. They didn't trust him too much because they didn't have the marijuana in the car then. But Mr. Wood goes with Mr. Bonnell. Why does he go with Mr. Bonnell? and Mr. Doyle goes somewhere else to pick this stuff up. They had to keep an eye on him.

One goes out here, picks it up and checks to see if everything is safe and the other stays to keep an eye on him so he couldn't drop a dime.

What does it mean - "drop a dime"? That means so you don't call someone and tell them the deal is about to go down. So Woody goes along - Mr Richard C. Wood, the watch dog. He goes along with Bonnell and sits with him at a pre-arranged meeting place as agreed. Mr. Doyle comes up behind, flashes the lights. He admits it because he was observed by some of the law enforcement officers. By pre-arrangement he pulls into the rear of the 224 club and the deal goes down.

Think about Bonnell for a minute when talking about Bonnell. I guess we have to. Bonnell is riding between the devil and the deep blue sea in this case. On one hand he knows he has to testify. On the other hand he knows he has to go to prison and thirdly, he is scared. Scared to death. He got the word from the evidence - he was afraid for his life. That there was a hit man here or in the penitentiary. Yes, afraid for his life and probably a legitimate worry about his life. Yes he was riding between the devil and the deep blue sea. His position is not very comfortable but an informant never is.

So like I said before, I can't apologize for him but he is and was necessary for the enforcement of the narcotic's law.

All right - a big point was made over the statement of Jefferson Doyle. The statement at the sheriffs office the morning of the arrest and search. A significant admissin that was not relevant to the Prosecuting Attorney - myself. And frankly I don't know if it was made or not. I simply don't remember if Mr. Beamer told me or didn't tell me. I know this - that they were extremely busy when this

was taking place, and he could or could not have told me. It don't matter and the reason is because Mr. Beamer said on the witness stand we had enough evidence. I want you to make the same evaluation that is shown from the evidence Mr. Beamer made. He was dealing with Richard Wood, this defendant, and Jefferson Doyle Evaluate it just like he evaluated it that night. He knew, ladies and gentlemen, that he was dealing with convicted felons, two of them. Convicted felons. No green horns, no youngsters off the street, no inmature pedler. Two convicted felons. One on a gun offense and one on larceny by trick. Do you know what that is? It is lying. It is telling a lie to get money or property from some one - some unsuspecting victim. Larceny by trick - the gut of it is lying. That is what Mr. Doyle was convicted of - lying for profit.

Beamer in valuating this case, knew it, so do you think..

BY MR. WILLIS:

Objection.

BY THE COURT:

Overruled.

--ladies and gentlemen, for a minute that Beamer or any other law enforcement officers involved in this case would think that Jefferson Doyle and Richard Wood would come in and admit he said that. He anticipated, as did I, since I became a witness in this case, that Mr. Jefferson Doyle and Mr. Wood would take that stand and lie.

BY MR. WILLIS:

Objection.

BY THE COURT:

The jury will have to make that decision.

BY THE PROSECUTOR:

--just like they have been convicted of. What is paramont importance with law enforcement agencies in our county in dealing with, and know you are dealing with known liars. That we can assume he will come in court and tell the truth about that point? That is nonsense. Once again, ladies and gentlemen, it's a red herring.

It is an attempt to distract your attention from the true issues in this case, which are whether or not this deal took place or not.

Another point that should not distractyour attention. The testimony of Capt. Jack Griffin of the police department. The defense played a tape for you where they claim he made a statement that was supposed to have been different from what he gave on the witness tand. If you listened to that tape, ladies and gentlemen, all you heard was a very garbled cross examination because all I heard was the lawyer talking. Yet when Capt. Griffin looked at the statement he gave in conjunction with Hobert White that they worked together, he said I saw it come out the window. His recollection was refreshed. He saw it come out the window. That statement was made within a few days and before - much before, ladies and gentlemen, as was the second testimony much before the State of Ohio, the Prosecuting Attorney, or any investigator had any idea what kind of story would be developed by the defense in this case. Don't let it distract you.

The defense in this case was very careful to make no statements

at all until they had the benefit of hearing all the evidence against them and had time to ascertain what they would admit and what they would deny and how they could fit their version of the story with the state's case. During none of this time did we ever hear any business about a set up or frame or anything else. All right.

Yes, it is the law of our land, and rightfully so, ladies and gentlemen, that nobody must be compelled to incriminate themselves. It is the 5th Amendment. No one can be forced to give testimony against themselves where criminal action charges are pending. It is a very fundamental right and I am glad we have it.

The idea was nobody can convict himself out of his own mouth and it grew out of the days when they used to whip and beat and extract statements from the defendants and get them to convict themselves out of their own mouth, and I am glad we have that right.

But ladies and gentlemen, there is one statement I am going to make. If you are innocent, if you are innocent, if you have been framed, if you have been set up as claimed in this case, when do you tell it? When do you tell the policemen that?

BY MR. WILLIS:

Objection.

BY THE COURT:

He may ask the question. It is something for the jury.

by Mr. Cunningham:

Think about it. After months - after various proceedings and for the first time? I am not going to say any more about that but I want you

to think about it. So once again, once again, please, when youconsider this case, think about the facts in this case and don't be distracted by personalities, or attacks on me, Beamer, or anyone else. Think about the case. Think about it in its prospective.

One more thing. It is a big case - big case. This is a big case. This is being smoked at Ohio University - Ohio State campus, Kent, etc. What is this all about.

I'll tell you what it about, ladies and gentlemen. Smoking a cigarette and I dont' want to comment on it, but this is not about smoking a cigarette . Call it big or small relative to what goes on somewhere else. What we are talking about is money. Lots of it. Cash. Big business - big profits and it is against the law because it is a drug - it is a narcotic and we don't want it in our county. I don't want the likes of Mr. Doyle and the likes of Mr. Woods selling big quantities of marijuana to our kids. We dont' want them to profit at the expense of this county and people in this county. So don't tell me what they do at Ohio State or what they do at Kent or what they do at Muskingum. I especially don't like it when they come in and make big money on it.

Convict them because they are guilty, ladies and gentleman. Thank you.

Supreme Court, U. S.
FILED
JUL 28 1975
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

RICHARD WOOD, *

PETITIONER, *

vs. * NO. 75-5015

THE STATE OF OHIO, *

RESPONDENT. *

* * * * * * * * * * * * * * *

BRIEF OF RESPONDENT IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

* * * * * * * * * * * * * * *

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I. QUESTIONS PRESENTED FOR REVIEW.

1. Can an accused or his accomplice-witness take the stand as witnesses at trial and commit perjury with impunity from confrontation with prior inconsistent statements and acts?

2. Where an oral statement made by a defense witness is unknown to the Prosecutor at the time discovery was requested by the defendant, is it reversible error to introduce this statement for the limited purpose of attacking the credibility of the defense witness?

3. Does a Trial Court abuse his discretion when he refuses to charge the jury that a paid informant's testimony should be examined with greater than ordinary scrutiny?

II. STATEMENT OF THE FACTS OF THE CASE.

A. PROCEEDINGS BELOW.

The petitioner was originally convicted of sale of an hallucinogen by a jury in the Common Pleas Court of Tuscarawas County, Ohio, on October 9, 1973.

The Ohio Fifth District Court of Appeals subsequently affirmed the conviction, and the Ohio Supreme Court denied defendant's appeal.

This matter is before this Court on the petition for certiorari by the defendant below.

B. THE FACTS OF THE OFFENSE.

On April 28, 1973, the Multi-County Narcotics Bureau, which operates in Tuscarawas County, Ohio, among other counties,

received word from one of its informants that he had set up a deal to purchase 10 pounds of marijuana from the defendants. The defendants wanted $175.00 a pound, or $1,750.00 for the 10 pounds.

There was a frantic rush to gather the money in time. Only $1,320.00 could be gathered, but this amount was photocopied so that the serial numbers of the bills could be recorded.

The informant was given the money and went off to his rendezvous at the Cloverleaf Bar on West Third Street in Dover, Ohio. There he met the defendants. Since the Cloverleaf Bar was too crowded to talk business, they went across the street to another bar where the bargain was struck.

(It should be noted that this statement of facts refers to defendants since two men were involved and charged on the same set of circumstances, although the case arrives here with a single defendant because each was tried and convicted separately.)

The defendant Doyle then went to get the marijuana while the defendant Wood stayed with the informant who drove to the nearby city of New Philadelphia, eventually winding up behind a bar called the 224 Club. The informant pulled his vehicle into the parking lot of the 224 Club after receiving a signal from the defendant Doyle who flashed his headlights on and off.

The exchange took place at this location. The defendants gave the informant the marijuana, and he gave them the money.

Now during this entire time, the defendants and the informant were under surveillance by a group of law enforcement officers--some from the Multi-county Narcotics Bureau and some from the Dover Police Department, the New Philadelphia

Police Department, and the Tuscarawas County Sheriff's Department. One of these officers, Captain--now Chief--Griffin, of the Dover Police Department, saw the transfer in the parking lot of the 224 Club and testified at trial to that effect.

When the defendants were picked up, they were asked to give consent to have their car searched, but refused. Then police officers secured a search warrant and, sure enough, there was the money which had been photocopied under the floor mat on the passenger side.

C. TRIAL.

Thus, the task of the defense at trial became threefold. 1) It had to undermine the credibility of the State's eyewitness--the informant. 2) It had to undermine the credibility of any witness who tended to back up the testimony of the defendant--specifically Chief Griffin. 3) It had to explain the money.

At trial, the defendants concocted a story about a frame, that the informant had, unknown to them, thrown the money into the back seat, and that they were chasing around trying to return the money to him at the time that they were arrested. How did they explain what they were doing in the company of the informant anyway on that evening? Oh, they were trying to buy marijuana, not <u>sell</u> it.

The Trial Court instructed the jury:

> Now, ladies and gentlemen of the jury, you are the sole judges of the facts, the credibility of the witnesses, and the weight of the evidence.
>
> To weigh the evidence, you must consider the credibility of each witness. You will apply the tests of truthfulness which you apply in your daily lives.

> These tests include the appearance of each witness upon the stand; his manner of testifying, the reasonableness of the testimony; the opportunity he had to see, hear, and know the things concerning which he testified; his accuracy of memory; frankness or lack of it; intelligence, interest, and bias, if any, together with all the facts and circumstances surrounding the testimony. Applying these tests, you will assign to the testimony of each witness such weight as you deem proper.
>
> You are not required to believe the testimony of any witness simply because he was under oath. You may believe or disbelieve all or any part of the testimony of any witness. It is your province to determine what testimony is worthy of belief and what testimony is not worthy of belief.

At trial, two separate juries disbelieved the story of the defendants and refused to find the informant and Chief Griffin impeached witnesses by convicting each of the defendants.

III. SUMMARY OF THE ARGUMENT.

The respondent respectfully submits that this case does not present to this Court those special and important reasons as set out in Rule 19 of the Supreme Court Rules for which a petition for certiorari should be granted.

The extensive quotations from the record in petitioner's brief clearly show that the case is presented here chiefly on a weight-of-the-evidence argument. Surely such matters as credibility of witnesses and resolution of disputed testimony are not those weighty matters with which this Court should concern itself.

The petitioner does argue that the Ohio courts have decided a federal question of substance, but even if that is so, respondent submits that this Court has already ruled authoritatively on the issue, and that the Ohio decisions below are in accord with this Court's applicable decisions.

IV. ARGUMENT.

A. CROSS-EXAMINATION OF A DEFENDANT AS TO HIS PRIOR INCONSISTENT ACTS.

The petitioner apparently contends that the Trial Court committed reversible error by allowing the State to cross-examine the defendants about their inconsistent conduct at the time of their arrest after they took the stand and claimed innocence because they had been framed.

The respondent answers that Harris v. New York, 401 U.S. 222 (1971) is determinative. At page 225 the Court said:

> Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury...Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately and the prosecution here did no more than utilize the traditional truthtesting devices of the adversary process...
>
> The shield provided by Miranda cannot be perverted into a license to use perjury by way of defense, free from the risk of confrontation with prior inconsistent utterances. (Emphasis added)

The respondent also commends to this Court other well-reasoned, though only persuasive, authority to the same effect. United States ex rel. Burt v. New Jersey, 475 F2d 234 (3rd Cir.

1973); United States v. LaVallee, 471 F. 2d 123 (2nd Cir. 1972); United States v. Ramirez, 441 F. 2d 950 (5th Cir. 1971) Cert. den. 404 U.S. 869; United States v. Russell, 332 F. Supp. 41 (E.D. Pa. 1971); Johnson v. People, 473 P. 2d 974 (Colo. 1970).

B. DISCOVERY.

Petitioner's contention here appears to be that the Trial Court committed reversible error when it permitted the State to cross-examine the defendant Doyle (appearing as a defense witness in the defendant Wood's case) about an oral statement he made to Narcotics Agent-in-Charge Beamer after his arrest, and to call Beamer on rebuttal to testify to his version of the same discussion.

The respondent wonders out loud whether this discretionary matter satisfies this Court's jurisdictional requirements. However...

Rule 16 of the Criminal Rules, in pertinent part says:

> Upon motion of the defendant, the Court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph any of the following which are available to, or within the possession, custody or control of the State, the existence of which is known, or by the exercise of due diligence may become known to the prosecuting attorney;...
>
> (ii) Written summaries of any oral statement, or copies thereof, made by the defendant or co-defendant to a prosecuting attorney or any law enforcement officer.

The petitioner further apparently contends that this part of Rule 16 entitles him to a reversal of his conviction.

The State replies that 1) no written summary of the oral statements of the defendant-witness Doyle ever existed and 2) even if the defendant was entitled in some way to discovery of the non-transcribed oral statements of the defendant-witness Doyle, the Trial Court, in a proper exercise of his broad discretion under Rule 16, gave all the relief the defendant-appellant was entitled to with a cautionary instruction.

Rule 16 (E) of the Criminal Rules goes on to say:

> (E) Regulation of Discovery...
>
> (3) Failure to Comply. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances. (emphasis added)

Here, the record shows that the Trial Court immediately gave the jury a cautionary instruction that the testimony of Beamer concerning the conversation with the defendant-witness Doyle was to be used only to test the credibility of the defendant-witness Doyle who had already testified to his version of the conversation.

The record is clear that the Prosecuting Attorney had no knowledge of the oral statement at the time he made his written reply in discovery. So even if he was under some duty to disclose these oral statements, which the respondent contends he is not, his response was correct at the time he made it.

C. REQUESTED SPECIAL INSTRUCTION AS TO CREDIBILITY OF WITNESSES.

Petitioner next contends that he was entitled to a special cautionary instruction as to the credibility of the informant who testified at trial.

Respondent answers first by disputing petitioner's claims that the informant was a drug addict and that his testimony was uncorroborated. The record clearly shows the informant's testimony was corroborated.

But even if the record did show that the informant was a drug addict and his testimony was uncorroborated (which respondent disputes), then there would be no binding rule of law

which required the Ohio Trial Judge to give the jury a special cautionary instruction beyond the proper general charge on credibility as set out in the statement of facts within this brief above.

In Ohio, it is not the province of the Court to classify witnesses, and give to the jury what the experience of the Courts may be in respect to such a class, but their credibility should be left to the jury, under all the competent facts and circumstances of the case before it. State v. Tuttle, 67 Ohio St. 440 (1902).

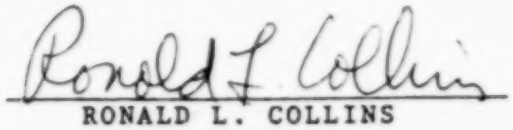
Many states have similar rules.

it seems strange to the respondent that such a discretionary matter as this could be the subject of a question decided by the Supreme Court of the United States. In order to do so, the Court would have to find, it seems to us, that a trial judge, as a matter of law, is constitutionally mandated by a criminal due process requirement to give a special cautionary instruction on the credibility of certain witnesses. The absurdity of such a rule is apparent by its recital.

V. CONCLUSION.

The respondent believes he is entitled to have the petition for a writ of certiorari denied. The petitioner received a fair trial. The Trial Court committed no error of constitutional, or even prejude. The matters which petitioner present do not show special and important reasons for review in the Supreme Court of the United States.

Respectfully submitted,



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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of July, 1975, a copy of the foregoing Brief of Respondent in Opposition to Petitioner's Petition for a Writ of Certiorari was mailed, postage prepaid, to James R. Willis, Esq., Attorney at Law, 1212 Bond Court Building, 1300 East Ninth Street, Cleveland, Ohio, 44114, and to William J. Brown, Attorney General of Ohio, Suite 202, 48 E. Gay Street, Columbus, Ohio. I further certify that all parties required to be served have been served.

Ronald L. Collins

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IN THE SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1974

No. 75-5015

RICHARD WOOD

Petitioner

vs.

STATE OF OHIO

Respondent

ORIGINAL COPY

Petro REPLY BRIEF

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10

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 75-5015

RICHARD WOOD

Petitioner

vs.

STATE OF OHIO

Respondent

REPLY BRIEF

Responding to the State's opposition to the issues raised by our petition, the point should be made here that this Court's decision in United States v. Hale, ____U.S.____ (6/23/75), has not altered their stance. Thus, the State's counsel still cites, as compelling here, certain cases that were expressly rejected by this Court in Hale.

Here reference is being made to the following express language, from the Brief of Respondent, whereby he "commends to this Court" as well reasoned and persuasive authority, the decisions of "United States ex rel Burt v. New Jersey, 475 F 2d 234 (3d Cir. 1973); United States v. LaValle, 471 F 2d 123 (2d Cir. 1972); United States v. Ramirez, 441 F 2d 950 (5th Cir. 1971) cert. den., 404 U.S. 869; United States v. Russell, 332 F Supp 41 (E.D.Pa. 1971); Johnson v. People, 473 F 2d 974 (Colo.1970)." (Brief of Respondent, p. 5).

In taking the above position, Respondent's counsel was either oblivious to the fact that this Court flatly rejected the logic of this position after having considered some of the very cases relied on in the State's Brief.

Here reference is being made to the cases of Burt, supra, and Ramirez, supra. Thus, it could not be clearer, the State's espousal of the anachronistic notion as expressed in the following segment of the Opinion by the Court of Appeals, simply cannot be validated. Here the Court of Appeals stated:

> "After the defendant-appellant took the stand and testified in detail as to a narrative of events he claimed to be exculpating, he was cross-examined by the prosecutor, in substance, as to why he did not give this same account when first confronted by the authorities (R 504-508).
>
> This was not evidence offered by the state in its case in chief as confession by silence or as substantive evidence of guilt but rather cross examination of a witness as to why he had not told the same story eariler at his first opportunity.
>
> We find no error in this. It goes to credibility of the witness." (See Appendix, Petition for Certiorari, p. 64.)

As to all this, it may suffice simply to say that this ruling by the Court of Appeals is diametrically opposed to the position taken by this Court in Hale.

Thus we contend that, for this reason alone, the grant of certiorari in this case should be assured. On the other hand, our case is much stronger than Hale. For, here, the trial court not only overruled our objections to these constitutionally impermissible questions, the Court affirmatively permitted counsel for the State to not only fully exploit this line of questioning, but to argue the resultant inferences,

and other related points to the jury. Here we have reference to the following additional questions based on why petitioner did not reveal his version of the facts at the preliminary hearing, and why he refused to consent to the search of the car, which required the police to obtain a search warrant. Here the record shows counsel for the State was authorized by the Court to make the following argument:

> "But ladies and gentlemen, there is one statement I am going to make. If you are innocent, if you are innocent, if you have been framed, if you have been set up as claimed in this case, when do you tell it? When do you tell the policemen that?
>
> BY MR. WILLIS: Objection.
>
> BY THE COURT: He may ask the question. It is something for the jury.
>
> BY MR. CUNNINGHAM: Think about it. After months - after various proceedings and for the first time? I am not going to say any more about that but I want you to think about it. So once again, once again, please, when you consider this case, think about the facts in this case and don't be distracted by personalities, or attacks on me, Beamer, or anyone else. Think about the case. Think about it in its prospective." (See Appendix, Petition for Certiorari, pp. 90-91.)

The above comparisons with this Court's decision in Hale certainly demonstrate crucial flaws in this petitioner's conviction. On the other hand, perhaps an even greater flaw in this conviction is exposed from the fact that in Hale the trial Court had both sustained defense objections to the impermissible line of questioning and instructed the jury to disregard its implications; whereas, the trial Court here not only permitted the entire line of questioning to be exhausted but affirmatively allowed these points to be argued to the jury.

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II

Also, the point must be made here that the penalty provision of the statute, under which Wood was sentenced to a term of 20-40 years for the sale of marijuana, has been declared unconstitutional by the Sixth Circuit Court of Appeals, in Downey v. Perini, ___F 2d___ (decided July 3, 1975, Case No. 74-1929). While a stay of execution has been granted the State in that cause, pending application in this Court for a writ of certiorari, the point must still be made here that should this Court sustain the Sixth Circuit's Downey decision then surely this is a further factor that should cause this Court to deal directly with this cause.

Respectfully submitted,

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